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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

XEROX CORPORATION,
A NEW YORK CORPORATION,

Petitioner,

vs.

PETER N. TOLLIVER, LEON A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SIEBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual who fails to file a timely administrative charge with the Equal Employment Opportunity Commission ("EEOC") may commence his own individual action under the Age Discrimination in Employment Act of 1967 ("ADEA") by "piggybacking" on a charge filed by another person not a party to the lawsuit.

2. Whether an individual may "piggyback" on another person's charge as a basis to commence an independent ADEA action in the absence of any demonstrated factual nexus between his claim and the claim of the individual who filed the charge.

PARTIES TO THE PROCEEDING

In compliance with Rule 29.1, Xerox Corporation (the Petitioner) submits a list of its subsidiaries (except wholly owned subsidiaries) in the Appendix at page (A.71). Xerox Corporation has no parent corporation.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of *certiorari* issue to review

the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above entitled proceedings on November 14, 1990.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is reported at 918 F.2d 1052, and is reprinted in the Appendix. (A.1).[1]

The order of the Court of Appeals for the Second Circuit denying Xerox' petition for a rehearing with a suggestion for a rehearing *in banc* is reprinted in the Appendix. (A.64).

The decision and order of the United States District Court for the

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[1] Citations to the Petitioner's Appendix shall be noted by an A. followed by a page number. (A.____).

Western District of New York (Larimer, D.J.), filed on February 15, 1990 is reported at 54 FEP Cas. (BNA) 622 (1990), and is reprinted in the Appendix. (A.18).

STATEMENT OF JURISDICTIONAL GROUNDS

This petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit arises from the decision and opinion filed on November 14, 1990 reversing the dismissal of respondents' ADEA claims. (A.1). A petition for rehearing with a suggestion for a rehearing *in banc* was denied by order entered on January 24, 1991. (A.64). On February 7, 1991, the Court of Appeals granted petitioner's motion for a stay of the mandate for thirty days pending the filing of a petition for a writ of *certiorari* in this Court. The petitioner now invokes the discre-

tionary jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are provisions of the Age Discrimination in Employment Act. 29 U.S.C. §§ 621-634 (1988) ("ADEA"). Specifically, they are 29 U.S.C. § 626(d) and 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA") as incorporated by reference into ADEA by 29 U.S.C. § 626(b). 29 U.S.C. §§ 216(b) and 626(d) are reprinted in the Appendix. (A.67-70).

STATEMENT OF THE CASE

The eighteen respondents, each of whom failed to file a timely charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to Section 7(d) of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 626(d), are all former Xerox employees over the age of 40. Their occupations ranged from clerks and technicians to managers and engineers. (J.A. 18-226; 480-485).[2] Thus, they held varying titles in the Rochester area ranging from Tool Coordinator in the Manufacturing

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2 References to "J.A." are pages to the Joint Appendix filed in the Second Circuit Court of Appeals.

Division (Oliveri) to Quality Control Consultant in the Systems Services Division (Travis) to Senior Facilities Planner in the Facilities and Administration Division (Wiater). (J.A. 121; 198; 222). Their dates of separation span nearly two years from November 1, 1981 (Fordham) to July 11, 1983 (Oliveri). (J.A. 237). The respondents were separated from Xerox as a result of several reductions in force ("RIFs"), some of which were voluntary, and some of which were involuntary. (J.A. 18-226; 480-85).

The respondents here were among the 1,312 persons who opted into a conditionally certified class action asserting a claim of age discrimination. *Lusardi v. Xerox Corp.*, 99 F.R.D. 89 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984) (*"Lusardi I"*). The definition

of the conditionally certified class in the *Lusardi* action was:

> All salaried employees in the forty (40) - seventy (70) age group who in the period May 1, 1980 through March 31, 1983 have been terminated or required to retire from employment at an age less than seventy or have been denied equal employment opportunities for promotion in any unit, division or American subsidiary of Xerox Corporation and who contend that such termination, retirement or denial of promotion was caused by age discrimination policies or practices of Xerox Corporation.

(J.A. 275). The *Lusardi* action had been commenced by four named plaintiffs, each of whom had filed nearly identical charges with the EEOC in New Jersey on or about January 7, 1982 (collectively the "Lusardi charge"). *See Lusardi v. Xerox Corp.* 118 F.R.D. 351, 378 (D.N.J. 1987) (*"Lusardi II"*). Each of the four filing named plaintiffs in the *Lusardi* action was a sales person of facsimile devices

distributed by the Office Products Division of Xerox. *Id.* at 353 n.2.

Thereafter, upon motion by Xerox, the District Court, Judge Alfred J. Lechner, ordered the conditionally certified class decertified. Judge Lechner found that extensive discovery conducted on a sample group of the conditional class members revealed that the conditionally certified class should be decertified because the actions taken by Xerox were not a single company-wide RIF, but involved "more than sixty RIFs occurring over a four year period, conducted and implemented by thousands of local supervisors pursuant to varying procedures." *Lusardi II* at 372. The District Court found that the facts compelled a finding that the conditionally certified class members were not similarly situated:

> Because it appears the members of the proposed class come from different departments, groups, organizations, suborganizations, units and local offices, as well as different subsidiaries of Xerox, performed different jobs at different geographic locations, were the subject of different job actions concerning reductions in the Xerox workforce (including resignations, promotions, terminations for cause, etc.) which occurred at various times as a result of decisions by different supervisors made on a decentralized employee-by-employee basis, plaintiffs are not similarly situated.

Id. at 352. Judge Lechner also noted that not all opt-in class members had filed their own EEOC charges, and found that the charges which were filed did not sufficiently provide notice that they were filed on behalf of others similarly situated. *Id.* at 378.

Following the order decertifying the class, the Third Circuit issued a *mandamus* directing Judge Lechner to reconsider his decertification order without reliance on whether each opt-in

claimant filed a timely charge. *Lusardi v. Lechner*, 855 F.2d 1062, 1077-80 (3d Cir. 1988).

On remand, Judge Lechner affirmed his factual findings and his decertification decision. Again, Judge Lechner noted that the extensive discovery revealed that the opt-ins were really 1,312 individual claimants who were not similarly situated, and whose claims demonstrated a lack of common facts among the claimants. Moreover, Judge Lechner reiterated that the opt-ins had failed to show any pattern or practice of discrimination by Xerox cognizable as an ADEA representative action. *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 466 (D.N.J. 1988) (*"Lusardi III"*).

Following decertification, these 18 former opt-ins commenced 18 separate lawsuits against Xerox each alleging a

cause of action under ADEA. None filed a timely charge; each sought to excuse this failure by "piggybacking" on the Lusardi charge.

Xerox moved to dismiss the respondents' complaints for, *inter alia*, failing to timely file ADEA charges. Judge Larimer found no basis to excuse the filing requirement and, therefore, ruled that the rationale behind the piggyback exception did not apply to these former opt-ins. (A.45). Judge Larimer noted that not one of the respondents had shown that either Xerox or the EEOC was aware of his individual claim before he filed his untimely EEOC charge or commenced his individual lawsuit. (A.40-42). All but one of the respondents opted into the *Lusardi* action long after their 300 day period for filing an administrative charge had run and none

ever asserted that he failed to file a charge in reliance upon the pending *Lusardi* action. (A.40-41; J.A.18-226, 480-485).3

The respondents appealed the decision of the Western District of New York. On November 14, 1990, a panel of the Second Circuit reversed the decision and held that these 18 respondents were excused from the ADEA charge filing requirement and could rely upon the charge filed by Jules Lusardi to maintain their own individual lawsuits.

The Second Circuit did not have the Lusardi charge before it. Instead, it relied on a small excerpt of the

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3 Respondent Oliveri opted into the *Lusardi* action within 300 days of his termination (A.41), but was not properly a member of the conditionally certified class as his date of termination (July 11, 1983) was outside the period specified in the class definition.

charge set forth in *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988) to reach its decision. That excerpt read:

> Xerox has engaged and is continuing to engage in employment practices related to hiring, training, promotion and termination of past, present and future employees which discriminate against persons such as myself over forty as a class particularly with respect to the implementation of a reduction in salaried work force.

Id. at 1078. (A.13). Focusing on the breadth of the language, the court ruled that so long as any charge contains "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim," no purpose would be served by requiring further administrative filings. (A.12).

Further, the court held that non-filing individuals could rely upon such a prior filing to bring their own

lawsuits. (A.16). The Second Circuit recognized that, in the analogous statutory framework of Title VII, "the single filing rule has been used only to permit joining a preexisting suit in which at least one plaintiff had timely filed a charge." (A.11). However, the court determined that such a limitation was unnecessary under ADEA. Instead, the Second Circuit pointed to the issuance of a right-to-sue letter in Title VII, which is not required by ADEA, to support its holding that ADEA plaintiffs may use the "single filing rule" to commence independent lawsuits. (A.11).

REASONS FOR GRANTING THE WRIT

POINT I

THE CENTRAL PURPOSE OF THE ADEA CHARGE FILING REQUIREMENT - NOTICE TO THE EEOC AND THE EMPLOYER TO PROMOTE INVESTIGATION, CONCILIATION, AND VOLUNTARY COMPLIANCE, THEREBY AVOIDING LITIGATION - IS RENDERED MEANINGLESS BY THE SECOND CIRCUIT'S DECISION.

Pursuant to 29 U.S.C. § 626(d)(1988), the general rule under ADEA is that a timely administrative charge must be filed with the EEOC by an individual before he can commence an action. *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52 (3d Cir. 1989).[4] Prior to the Second Circuit's decision, a narrowly drawn exception to this statutory requirement had been recognized by some circuits, permitting plaintiffs who had not filed timely charges to opt in or

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[4] 29 U.S.C. § 626(d)(1988) is reprinted in the Appendix. (A.67).

intervene in a suit filed by a representative plaintiff who had timely filed a charge. *See e.g., Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754 (9th Cir. 1979).

The Second Circuit's decision drastically expands the exception, thereby swallowing the rule. Relying upon conclusory language alleging generic age discrimination in an excerpt of the Lusardi charge, the Second Circuit ruled that any person may maintain his own independent action without filing an ADEA charge, so long as a charge, filed by another, contains "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." (A.12). Thus, the Second Circuit's decision permits the broadest

possible generic charge to excuse the filing requirement for any plaintiff who thereafter sues. Such a result eviscerates the notice purpose of the ADEA filing requirement.

It is undisputed that a purpose of ADEA is to facilitate resolution of alleged discriminatory practices through prompt and timely filing of a charge containing allegations of age discrimination to promote investigation, conciliation and voluntary compliance. In that regard, this Court has recognized the similarity of purpose and procedure between the ADEA and Title VII charge filing provisions. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 123-124 (1988); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). As the Seventh Circuit stated in *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988):

> Certainly, both the Title VII requirement and the ADEA charge requirement are intended to perform the same functions. In both statutory schemes, the charge is designed to afford the defendant notice of the allegations and to permit conciliation by the EEOC. *See* H.R. Conf. Rep. No. 950, *supra*, *reprinted in 1978 U.S. Code Cong. & Admin. News* 528, 534; *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir. 1985).

Id. at 1016.

Thus, cases construing the Title VII filing requirement are instructive in the analysis of the analogous ADEA filing requirement. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979).

In individual and representative actions alike, the central purpose of the charge filing requirement under ADEA and Title VII is to provide prompt notice to both the employer and the EEOC to promote an opportunity for the *employer* to comply voluntarily and to allow investigation and conciliation. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395

n.11 (1982); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Snell v. Suffolk County*, 782 F.2d 1094, 1101 (2d Cir. 1986); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 760 (9th Cir. 1979).

In order to promote voluntary compliance and informal conciliation of a claim, both the employer and the EEOC must be on notice of the facts comprising the grievance of an individual or those similarly situated and aggrieved by the same alleged discriminatory treatment during the conciliation stage. Indeed, the facts act as the catalyst to the EEOC's investigation which, in turn, may lead to conciliation. *See H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News*, 504, 534. *Babrocky v. Jewel Food Co. & Retail Meatcutters Union Local 320*, 773 F.2d 857, 863 (7th

Cir. 1985); *Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970) ("the crucial element of a charge of discrimination is the *factual* statement contained therein") (emphasis supplied in original). Without such notice, the EEOC will be hampered in gathering specific and detailed information about an employer's alleged discriminatory conduct. The Second Circuit's decision, however, obviates the need to provide such factual notice.

The Second Circuit focused on the EEOC's interest in receiving meaningful notice. It held that: "The purpose of the charge filing requirement is fully served by [a charge] that alerts the EEOC to the nature and scope of the grievance...." (A.10-11). The Second Circuit, however, failed to recognize

that the employer, as well as the EEOC, has a vital interest in receiving adequate notice of a claim because depriving the employer of factual particularity stifles the opportunity to investigate and conciliate and defeats the purpose of ADEA's charge filing requirement.

To conciliate a claim, the employer must receive notice of the allegations it faces. Meaningful notice can only be achieved when a claimant provides the EEOC and the employer with reasonably specific and concrete allegations which "trigger the investigatory and conciliatory procedures of the EEOC." *Sanchez*, 431 F.2d at 466. Indeed, the EEOC's own regulations contemplate the filing of charges which are reasonably specific and provide detailed information. *See* 29 C.F.R. § 1626.8 (1990) (a charge should contain a clear and

concise statement of the facts including, *inter alia*, pertinent dates, identities and approximate number of employees affected).5

Nevertheless, the Court held that an excerpt of the Lusardi charge which is devoid of facts and contains only generic conclusory allegations of discriminatory conduct is sufficient to excuse the filing requirement for each of the 18 respondents and to allow each to maintain his own lawsuit. That excerpt is unlimited in time and scope, and applies to all aspects of employ-

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5 Below, the EEOC in its *amicus curiae* brief advanced a position that only a broad charge is required. That position is (1) contradicted by its own regulations which encourage specificity, and (2) undermined by the EEOC's liberal amendment provisions allowing an ADEA charge filer to clarify or amplify allegations to relate back to the original filing date. *See* 29 C.F.R. § 1626.8 (c) (1990).

ment. The language is so vague and broad as to be tantamount to no notice at all to Xerox during the conciliation stage. The excerpt encompasses the entire protected group of employees 40 and over, who were, are, or will, at some time in the future, be employed by Xerox. Clearly, conciliation with such a group regarding claims which span all aspects of employment is impossible, particularly in the age discrimination context. Obviously, an employer can not conciliate today with an employee claiming to be aggrieved by some unspecified stale allegation of age discrimination. Nor can it investigate or conciliate a future claim of someone not even hired yet.

Further, the Second Circuit assumed that because the Lusardi charge was not resolved by conciliation, it

would be "wasteful" to require these respondents to adhere to the charge filing requirement. (A.14-15). However, neither the Second Circuit nor the EEOC will ever know whether the nature and scope of the charges which could have been filed would have been more limited than the Lusardi charge in terms of time frame or the specific employment practice challenged. Depending on the nature of those subsequent filings, Xerox and the EEOC might have received more adequate notice of the grievance and may have been able to conciliate those claims.

The effect of the court's holding is to encourage any disgruntled employees to file generic charges alleging conclusions of company-wide discrimination. Employees who formerly would have had to provide notice of their own

claims before instituting a lawsuit can now forego filing altogether and seek shelter under the expansive umbrella of another's blunderbuss charge, thereby circumventing the administrative process. This result will have a particularly drastic impact on large, nationwide employers such as Xerox. Instead of actual notice of a grievance involving a group which can be identified, an employer is now confronted with the rough equivalent of constructive notice of a limitless number of people who may thereafter file lawsuits. As a result of the Second Circuit's decision, employees with grievances arising in the future may seek to peruse previously filed charges concerning their employer in search of a limitless generic charge, and go directly to court, short circuiting any possibility of conciliation.

Perhaps even more destructive to the central purpose of the filing requirement, the Second Circuit's new standard creates a disincentive for an employer charged with an ADEA violation to attempt to conciliate. It encourages overbroad charges which are impossible to conciliate and negates any element of finality to the conciliation process. By allowing other individuals to sue on their own by piggybacking on a company-wide charge, the employer no longer has any assurance that successful conciliation of the charge actually filed will end the matter. An employer has no assurance that once it has conciliated a grievance based upon a given charge, that others thereafter may not sue based upon that same charge, alleging they can fit themselves within the scope of its language. Just as there is a diminished

incentive for an employer to conciliate a subject which has already been resolved through EEOC conciliation efforts, there is no incentive for an employer to attempt to conciliate where there is no assurance that the administrative process will provide some finality. *See Sanchez*, 451 F.2d at 466.

Additionally, the Second Circuit's decision effectively shifts the burden of providing notice from the claimant to the employer who must now guess who might conceivably be permitted to piggyback on a charge containing company-wide allegations. If conciliation is to be a real option for the employer, the employer now has the burden of ferreting out which other potential claimants may exist and the nature of their particular grievances rather than encouraging individuals with age dis-

crimination charges to step forward and provide notice of the nature of their claims. In effect, employers must now take over the investigative role formerly assigned to the EEOC.

Moreover, as this Court has recognized, there is a substantial gap between class allegations of a systematic pattern of discrimination and an individual claim of discrimination. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982). It follows that administrative conciliation of a charge alleging the existence of a policy or widespread practice of discrimination is far different than conciliation involving a single claim of discrimination. When a charge is filed on a class-wide basis, the employer must address and investigate the allegations of a pattern of systematic conduct, the possibility

that a large number of people are involved, and the inherent concerns of the costs and the impact on its operations. It may, after internal review and attempted conciliation, conclude such class-wide allegations are unfounded, and determine it is ready, if necessary, to litigate the issues. Such a conclusion does not necessarily encompass consideration of the possibility that an individual may have suffered unlawful discrimination. Thus, where a plaintiff relies upon another's charge of class-wide discrimination, he should only be permitted to do so, if at all, as an unnamed plaintiff in the context of a representative action where such class-wide issues which were the subject of the investigation and attempted conciliation will be litigated. Indeed, such issues define the "nature and

scope" of the charge. *See Bean v. Crocker*, 600 F.2d at 760 (a non-filing ADEA plaintiff can only participate as an unnamed party in a representative action); *accord Nowicki v. USX Corp.*, 672 F. Supp. 854, 857 (W.D. Pa. 1987).

While the Second Circuit recognized that 29 U.S.C. § 626(d) functions as a statute of limitations, it ignored the interest of the employer in the enforcement of that provision. A key purpose of this requirement is to bar tardy reassessments by disgruntled employees. *See e.g., Kloos v. Carter-Day Co.*, 799 F.2d at 400. As Judge Leval noted in *Foster v. CBS Records, Div. of CBS, Inc.*, 109 F.R.D. 168 (S.D.N.Y. 1986):

> Virtually everyone in the workforce at some point fails to get something they might have wanted. Whether the person was fired or merely failed to be chosen for a raise or promotion,

> he or she is a potential plaintiff if over 40. By adopting the requirement of a prompt administrative charge, Congress unquestionably sought to limit the potential for the filing of suits based on tardy reassessments.

Id. at 170. This analysis is particularly applicable here where none of the plaintiffs ever asserted that he was even aware of the Lusardi charge or that they delayed filing a charge in reliance on the pending *Lusardi* action. (A.40-41).

This Court, therefore, should grant the petition for a writ of *certiorari* to review the substantial and detrimental impact the Second Circuit's decision will have on a central purpose of the ADEA statutory scheme - providing prompt meaningful notice to employers to foster investigation, conciliation and voluntary compliance of such claims so that

they may be settled administratively without resort to the courts.

POINT II

THE SECOND CIRCUIT'S DECISION REPRESENTS AN UNPRECEDENTED EXPANSION OF THE "SINGLE FILING RULE," WHICH DIVERGES FROM PRECEDENT OF THIS COURT, CREATES AN APPARENT CONFLICT AMONG THE CIRCUITS AND ENCOURAGES AN UNNECESSARY PROLIFERATION AND DUPLICATION OF LITIGATION.

The "single filing rule" was developed to facilitate class relief in cases involving allegations of unlawful conduct affecting an identifiable class of similarly situated individuals. Inherent in the class context is the underlying premise that those who benefit from the exception share factual and legal commonality which renders the need for the filing of a multiplicity of identical charges unnecessary. The Second Circuit's decision drastically expands the rule to permit any individ-

ual to rely upon another's charge to commence his own individual action so long as the charge indicates it affects a group "defined broadly enough to include those who seek to piggyback..." (A.12). This severs the exception from the justification for its creation - facilitating class or representative litigation to deal with class issues. It conflicts with precedent in this Court and in other circuits indicating that the "single filing rule" should only apply, if at all, in cases where a non-filer seeks to join a class or representative action commenced by one who timely files. Moreover, it creates a test for piggybacking different from that applied in other circuits. This test does away with the requirement of a demonstrated factual nexus between the filer of the charge and those who seek to rely upon it which was inherent in a class,

intervenor or representative suit context. Absent such a factual nexus, a court has no basis to determine whether the conciliation function, which is the central purpose of the filing requirement, is served despite the fact that a litigant has not filed his own charge. Further, the result of the Second Circuit's decision will be a proliferation of piecemeal and repetitive litigation of issues which Congress intended to have litigated, if at all, in one action and the danger of inconsistent results arising out of a single administrative charge.

A. The "Single Filing Rule" Was Developed To Facilitate Class Action Treatment Of Class Issues.

The "single filing rule" developed first in the Title VII context. In the seminal case of *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), which

was relied upon by the Second Circuit in its decision, the court was presented with the issue of whether a plaintiff who had timely filed a representative charge alleging discrimination on a class-wide basis could thereafter maintain a class action, in which similarly situated individuals, who had not filed their own charges, would be permitted to participate. In *Oatis*, the court recognized that unlawful discrimination was "by definition class discrimination" and accordingly, it would frustrate the purposes of the statute to require as a prerequisite to relief on a class basis, that each class member aggrieved by the unlawful conduct, be required to file "separate, identical charges before the EEOC." *Id.* at 499. The court further recognized that such a result would not

do violence to the statutory scheme requiring the filing of a charge:

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful. The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated....

Id. at 498. The exception was not without limits: non-filers could participate in the action only if they were in "a class" and assert the same issues or some of the same issues as the plaintiff who filed the representative charge. Further, these non-filing class members could only proceed within the "periphery of the issues" which the filing plaintiff could assert. *Id.* at 499.

Several circuit courts thereafter extended the "single filing rule" to apply in the ADEA context, permitting a non-filing plaintiff to opt into a representative suit brought by a plaintiff who had filed a representative charge with the EEOC. *See e.g., Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1016-1017 (7th Cir. 1987); *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1987); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754, 759 (9th Cir. 1979); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989). This extension of the rule to apply to ADEA was based upon the recognition that the charge filing requirement in ADEA was closely analogous to and served the same purpose as in Title VII. Thus, the reasons justifying its development in Title VII applied with equal force to ADEA. *Anderson*, 852 F.2d

at 1016; *Bean v. Crocker*, 600 F.2d at 759. Further, unlike Title VII, Congress in ADEA, through its incorporation of the FLSA opt in procedure of 29 U.S.C. § 216(b), specifically provided for a class remedy through an opt in representative suit brought "by one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Thus, both the Third and Ninth Circuits allowed the "single filing rule" to be applied to ADEA to facilitate the representative opt in remedy contained in 29 U.S.C. § 216(b). In *Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), the Third Circuit, finding that the "single filing rule" applies to ADEA, issued a *mandamus* to Judge Lechner directing that he not consider whether each conditionally certified class member had filed a charge in deciding

whether to decertify the class. The Court concluded that if the District Court's error was not corrected, "the utility of the class remedy Congress prescribed in ADEA by incorporating FLSA § 216(b) will be unduly prescribed." *Id.* at 1079. Similarly, in *Bean v. Crocker Nat'l Bank*, the Ninth Circuit concluded:

> The ADEA's broad remedial purposes of prohibiting arbitrary age discrimination and of promoting the employment of older persons based on their ability rather than age are best served by an interpretation of 29 U.S.C. § 216(b) that permits similarly situated complainants to join in an action as unnamed parties so long as a named plaintiff has complied with the notice requirements of 29 U.S.C. § 626(d).

600 F.2d at 759.

Thus, in both the Title VII and ADEA contexts, the "single filing rule" exception to the otherwise strictly enforced filing requirement developed only to facilitate the bringing of a repre-

sentative or class action. To extend the exception to individual actions makes no sense because such an expansion severs the "single filing rule" from the reasons that justified its creation.

B. The Second Circuit's Decision Creates A Test For Piggybacking Which Conflicts With Those Applied In Other Circuits And Renders It Impossible To Determine Whether The Purposes Of The Filing Requirement Are Met.

Because the "single filing rule" developed to facilitate a class or representative action, those who sought to piggyback on the charge filed by the representative plaintiff necessarily shared some factual nexus with the facts and circumstances complained of by the representative plaintiff. Absent such a factual nexus there would not have been the common questions of law or fact as

required by Fed. R. Civ. P. 23 in the Title VII context, nor would they be similarly situated persons pursuant to 29 U.S.C. § 216(b) under ADEA. *See e.g., Oatis v. Crown Zellerbach Corp.*, 398 F.2d at 499; *Lusardi v. Lechner*, 855 F.2d at 1078.

In stark contrast, the Second Circuit, however, effectively eliminated the requirement for any factual nexus between the filer and the person seeking to rely upon the charge. The Second Circuit's test for whether one may rely upon the charge filed by another where the grievance is alleged to occur in a large nationwide organization is as follows:

> Though we do not think the administrative claim in such circumstances need specify that the claimant purports to represent a class or a group similarly situated, *there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim.*

(A.12) (emphasis added).

The test enunciated by the Second Circuit focuses not on any similarity of circumstances between the person filing the charge and the one seeking to excuse his failure to comply, but rather upon the breadth of the language of the charge. Accordingly, the broader and more generic the language or contents of the charge, the greater the number of persons who can piggyback on it.

In this respect, the decision of the Second Circuit conflicts with other circuit courts which clearly require, whether in the Title VII or the ADEA context, that the "single filing rule" permits only those who are "similarly situated" to the named party to join a representative action commenced by that party. *See e.g., Anderson*, 852 F.2d at 1016

(7th Cir. 1988); *Bean v. Crocker*, 600 F.2d at 754; *Crawford v. United States Corp.*, 660 F.2d 663 (5th Cir. 1981); *Jackson v. Seaboard Coastline R.R. Co.*, 678 F.2d 992, 1012 (11th Cir. 1982) ("the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame").

To determine the similarity of circumstances, the courts have looked for more than a mere generic assertion of discrimination and require that a factual connection must exist between the circumstances of the individual who filed the charge and the person seeking to piggyback upon it to ensure that the notice objectives have been satisfied.

In *Foster v. Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), for example, the court was confronted with whether non-filing

plaintiffs could intervene in an action brought by another who had timely filed. In that case the court recognized that the "single filing rule" had been adopted in the class action context. As the court noted, the rationale for the rule was the one articulated by Judge Bell in *Oatis*, that it would be "wasteful, if not vain, to require numerous employees all with the same grievance to process identical complaints." Thus, the *Foster* court recognized that:

> In class actions this rationale is invariably applicable, for *the very fact that the suit is a class action means that the plaintiffs' claims not only share common questions of law and fact*, but those claims are such that representative plaintiffs will fairly and adequately protect the interests of all plaintiffs of the class.

Id. at 1322 (emphasis added). The court went on to conclude that the same reasoning applied to permit intervention

and formulated the following test to determine when one may piggyback on the charge of another:

> It thus appears that the critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or whether he may escape this requirement by joining with another plaintiff who has filed such a charge, is the similarity of the two plaintiffs' complaints. Where the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges, then it would be "wasteful, if not vain," 398 F.2d at 498, to require separate EEOC filings. However, where the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts, then the rationale of *Oatis* does not apply. In such case each plaintiff should be required to separately file an EEOC charge in order to effectuate the purpose of Title VII's provisions for administrative relief.

Id. at 1322.

In applying this test, the court looked to the facts alleged in support of the plaintiff's motion to intervene. Concluding that plaintiffs alleged facts demonstrating they were similarly situated to the filing plaintiff and had received the same treatment, piggybacking into the same lawsuit was permitted. *Id.* at 1323; *accord Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 882 (11th Cir. 1977) (court holds in Title VII case where non-filing plaintiffs allege facts demonstrating they are similarly situated to the filing named plaintiffs, they may piggyback on charge to intervene in named plaintiff's action). *See also Palmer v. Readers Digest Ass'n*, 42 FEP Cas. (BNA) 212, 213 (S.D.N.Y. 1986) ("there must be a demonstrated similarity among the individual "situations" which I take to mean some identifiable factual nexus

which binds the named plaintiffs and the potential class members together as the victims of a particular alleged discrimination").[6]

Clearly, absent a factual inquiry and comparison, no court can determine that because the filing plaintiff's claim was not conciliated, the claim of the non-filer would not have been conciliated. In contrast, the

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6 Similarly, in an ADEA action the Third Circuit, in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), identified the factual and legal similarities necessary to a determination of whether individuals are "similarly situated" to permit a Section 216(b) action to go forward, where several persons sought to piggyback on another's charge. The court noted that all potential piggybackers were former employees of the same division, all claimed to be terminated pursuant to a common scheme of discrimination, all worked in the same zone of the division, all had the same manager and all sought the same relief. *Id.* at 52 and n.10.

Second Circuit's focus upon the breadth of the language of the charge, without requiring any common factual allegations, provides no basis to determine whether or not other filings would have been wasteful. Indeed, without reference to factual allegations, one can never know if the conciliation process arising out of the filing plaintiff's charge could ever have touched upon the circumstances of the person seeking to piggyback on the charge.[7] This Court's discussion of the similarly situated re-

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7 In this regard, the inquiry is no different than that which the court must make when it is asserted that the scope of an action is beyond the matters raised by the charge filed with the EEOC. The factual allegations are the "crucial element" which the court must focus on. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970); *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1359 (9th Cir. 1973).

quirement in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) is instructive here. In *Falcon*, the putative class representative failed to bridge the gap between an individual claim of discrimination and the existence of class-wide discrimination, and was disallowed to proceed as a representative of the proposed class. This Court noted that without specifically presenting common questions of law and fact, it was error for the district court to presume that Falcon's claims were typical of the purported class members. *See Falcon*, 457 U.S. at 158. The same rationale applies in this case and compels reversal of the Second Circuit's decision. Absent presentation of common facts, there is no basis to conclude that requiring these 18 respondents to file charges would have been "wasteful."

Moreover, the necessity of such an inquiry and determination demonstrates that such piggybacking should never be available to permit a non-filing individual to commence his own action. Such an individual should be permitted, if at all, to participate as an unnamed plaintiff in a representative action only if similarly situated to a named plaintiff who had timely filed a representative charge. It is the court before whom the filing plaintiff has brought his action that is in a position to determine whether the circumstances of the representative plaintiff and those who seek to be excused from the filing requirement are sufficiently similar so as to conclude that the purposes of the notice requirement are not frustrated by excusing the requirement for those who seek to piggyback.

Indeed, Judge Lechner's decision decertifying the conditional class in *Lusardi* demonstrates why piggybacking must be limited to the action commenced by the filing plaintiff. In that case, after exhaustive discovery, Judge Lechner as the trier of fact, was in the best position to determine whether or not there were others "similarly situated." Judge Lechner found that there was no commonality between the parties absent a centralized policy or practice of discrimination. *Lusardi II* at 359, 361, 372. As Judge Lechner confirmed in his opinion following the *mandamus*, he had decertified the conditionally certified class because he concluded it was merely a collection of 1,312 former Xerox employees with only their "termination and age within the protected range" in common. *Lusardi III* at 466. Given the lack

of any demonstrated factual nexus, there is no basis to conclude that because Lusardi's charge was not resolved, had Xerox received timely notice of these 18 individuals' grievances, they would not have been conciliated.

The petition should be granted to resolve the conflict among the circuits as to the appropriate standard to apply to determine when, if ever, one may piggyback on another's charge.

C. The Second Circuit's Decision To Permit A Non-Filing Individual To Sue Independently Diverges From Precedent Of This Court And Other Circuits.

This Court recognized the validity of the distinction between a class action context and the individual action context in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), when it stated that while exhaustion of state administrative

remedies in deferral states under ADEA is not always necessary for unnamed plaintiffs in class actions, it is *mandatory* for individual claimants. *Id.* at 758 and n.6. Logic dictates that the same distinction be maintained when the issue is the general requirement of recourse to the conciliation process before instituting legal proceedings pursuant to § 626(d). Nevertheless, the Second Circuit has refused to recognize this distinction by its unwarranted expansion of the "single filing rule."

Significantly, the Second Circuit recognized that, in the Title VII context, a non-filing plaintiff could not piggyback on another's charge in order to maintain his own lawsuit. (A.11); *accord Inda v. United Air Lines, Inc.* 565 F.2d 554, 559 (9th Cir. 1977); *Ezell v. Mobile Hous. Bd.*, 709 F.2d 1376, 1380-81

(11th Cir. 1983). Nevertheless, the Court determined that the "single filing rule" should be expanded here because ADEA, unlike Title VII, does not require a right-to-sue letter. (A.11). However, the issuance of a right-to-sue letter under Title VII is not a sufficient basis to reach disparate results in two analogous regulatory schemes. As discussed earlier, filing of the administrative charge serves the same purposes of notice and fostering conciliation in both statutes. Thus, there are no policy considerations which would support drawing any distinction in the application or expansion of the "single filing rule."

Moreover, the *sole* purpose of a right-to-sue letter is purely ministerial - to advise potential plaintiffs that administrative avenues to resolve the

allegations have been exhausted. *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 310 (2d Cir. 1975), *aff'd as modified on reh'g*, 520 F.2d 409 (2d Cir. 1975) ("The purpose of the notice of right-to-sue was definitely to fix a time when the administrative remedies had ended and when the 90-day statute of limitations began to run"); *accord Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1140 (5th Cir. 1971); *Jones v. United Gas Imp. Corp.*, 383 F. Supp. 420, 424 (E.D. Pa. 1974) ("issuance of the right to sue letter is a ministerial act").

The issuance of such a letter does not represent an opinion by the EEOC that there is any merit to the claimant's allegations, nor is it even required to be linked to a timely filed charge under Title VII. Indeed, the EEOC's own regulations state that a

right-to-sue letter will be issued as of course to anyone who files a charge, even if it is, on its face, time-barred and has been dismissed by the EEOC. 29 C.F.R. § 1601.18(a) and (e) (1990) and § 1601.28(e) (1990). In short, anyone can obtain one. Thus, it is clear that the right-to-sue letter does not provide any basis to distinguish the result reached here by the court, and the opposite result which the Second Circuit acknowledged is mandated under Title VII.[8]

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[8] Equally, the 1978 amendment of ADEA to require a "charge" rather than an "intent to sue" letter does not support the Second Circuit's expansion of the "single filing rule." The legislative history relied on by that Court refers to a Senate proposal which was never adopted. (A. 7-8) *See S. Rep. No. 493, 95th Cong.*, 1st Sess. 1 (1977). The appropriate legislative history demonstrates that the purpose of the amendment was merely to replace the requirement of a formal "notice of intent" to sue with a "charge." In all

(footnote continued on next page)

Similarly, although the Second Circuit is the first circuit court which has specifically addressed this issue, its decision conflicts with the position taken by other circuit courts dealing with the applicability of the "single filing rule" to ADEA. Several circuit courts have stated that its applicability is limited to cases in which a non-

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(footnote 8 continued from previous page)

other respects the purpose of the filing remained the same. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978), *reprinted in 1978 U.S. Code Cong., & Admin. News*, 504, 534. *See also Vance v. Whirlpool Corp.*, 707 F.2d 483, 487 (4th Cir. 1983).

Furthermore, 29 U.S.C. § 626 still provides that no civil action may be commenced until after the *individual* receives notification that the deferral state's conciliation process has terminated. It appears, therefore, that Congress continued to assume the individual who receives the notice of termination (*i.e.*, the individual who filed the charge) was the one entitled to initiate a civil lawsuit. *See* 29 U.S.C. § 626(d)(2)(1988).

filer seeks to join a suit in which a plaintiff has filed a charge. Thus, as the Eighth Circuit stated in *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986):

> We do not believe that it is necessary to fulfilling these purposes that every individual opt-in plaintiff file an administrative charge. Accordingly, we follow *Mistretta* and *Bean* and hold that it is sufficient for one or more plaintiffs to the action to have properly filed a charge.

Id. at 400.

Equally, the Third Circuit in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989) stated:

> Under § 7(d) of the ADEA, a complainant must file a timely charge of discrimination with the EEOC and the appropriate state deferral agency. 29 U.S.C. § 626(d) (1982). Ordinarily, a complainant who fails to file a timely charge is barred from seeking relief. However, § 216(b) permits opt-in plaintiffs who did not file charges to "piggyback" on the

> timely charge filed by the original complainant.

Id. at 52 (citations omitted).

Similarly, in *Bean v. Crocker Nat'l Bank*, one of the plaintiffs, Bean, had not filed a charge, but instead, sought to "piggyback" on a representative class charge filed by a co-plaintiff. The Ninth Circuit held that Bean could only participate as an unnamed class member stating that, pursuant to 29 U.S.C. § 216(b), similarly situated non-filers could "join in an action as unnamed parties so long as a named plaintiff has complied with the notice requirements of 29 U.S.C. § 626(d)." 600 F.2d at 759; *accord Nowicki v. USX Corp.*, 672 F. Supp. at 857.

The petition should be granted to resolve the apparent divergence between the Second Circuit's decision regarding the applicability of the "single filing rule" to lawsuits brought by non-filing individuals and precedent of this Court, other circuits, and the result mandated under the analogous provision of Title VII.

D. The Second Circuit's Decision Encourages An Expansion of Litigation And Creates A Real Threat Of Piecemeal Litigation And Inconsistent Results.

In Point I, *supra*, the corrosive impact that the Second Circuit's decision has on the administrative conciliation process was discussed. The decision, however, also has an important impact on the litigation process under ADEA. The expansion of the "single fil-

ing rule" to authorize a non-filing plaintiff to commence his own separate action would encourage a proliferation of unnecessary litigation. It would encourage piecemeal litigation of claims involving those who are similarly situated but have not filed timely charges. Such claims should only be litigated, if at all, together. Any other result is clearly at odds with the intent of Congress which provided a mechanism, a representative action through the opt in procedure, to litigate actions in which charges of systematic or a pattern of discrimination are filed. 29 U.S.C. § 216(b) (1988). It will result in the litigation of the same issues in different courts, including repetitive determinations of who might come within the scope of another's charge. Indeed, it will create the possibility of inconsistent results in different courts, re-

garding the scope and effect of the same charge.[9]

Further, by so drastically expanding the "single filing rule" and eliminating the filing requirement, the Second Circuit decision creates many troublesome issues which will certainly result in future litigation. Ironically, ADEA was enacted to achieve just the opposite result -- less litigation. For example, who is to determine whether an individual is within the scope of a charge, a court or the EEOC? When is this determination to be made? Is there

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9 Indeed, such results could include not only inconsistent conclusions as to who may sue by virtue of the same charge but what kinds of claims may be asserted in the multiplicity of actions arising out of a single filing. *See Sanchez*, 431 F.2d at 466 (the scope of the judicial complaint is limited to the scope of the EEOC investigation).

any time limit on the viability of a previously filed charge? Is there any limit to the number of individual suits a charge will support? Does conciliation of a class charge preclude individual suits by others within the scope of the charge? If a plaintiff is allowed to bring a suit with systemic allegations under the "single filing rule," is he also allowed to pursue any of the individual aspects of his complaint even though the defendant was never on notice of these issues? Such an expansion of litigation is unnecessary and unwarranted. As Judge Daly recognized in reaching the same conclusion as Judge Larimer in the case of another former Xerox nonfiler who tried to piggyback on the Lusardi charge to start his own class action:

> [A]n individual ADEA plaintiff need only allege that the EEOC and defendant had effectively been placed on notice of his claim, rather than that a formal charge had been filed. *Courts would then have to engage in case-by-case analysis of whether such notice was actually sufficient. Such a practice runs contrary to the clear congressional determination that only a formal filing sufficiently apprises the agency and any defendants of a plaintiff's claim.*

Allen v. Xerox Corp., No. B-89-383, slip op. at 10 (D. Conn. June 28, 1990) (emphasis added)(citations omitted).

In short, the Second Circuit has drastically expanded the "single filing rule" to a point beyond any logical basis, doing violence to the statutory scheme and creating the real threat of an unwarranted proliferation of litigation. This Court should grant *certiorari* to clarify the proper parameters of the "single filing rule."

CONCLUSION

For the reasons set forth above, a writ of *certiorari* should be issued to review the decision and opinion of the Second Circuit.

Respectfully Submitted,

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Dated: March 6, 1991

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 44-60, 325—August Term 1990

Argued: September 28, 1990

Decided: November 14, 1990

Docket Nos. 90-7201(L), -7203, -7205, -7211, -7213, -7215, -7221, -7223, -7225, -7231, -7233, -7235, -7241, -7243, -7245, -7253, -7281, -7251

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Plaintiffs-Appellants,

—v.—

XEROX CORPORATION, a New York Corporation,

Defendant-Appellee.

PAUL F. BRAUN,

Plaintiff-Appellant,

—v.—

XEROX CORPORATION,

Defendant-Appellee.

Before:

NEWMAN, PIERCE, and ALTIMARI,
Circuit Judges.

Appeals from the February 15, 1990, judgments of the District Court for the Western District of New York (David G. Larimer, Judge) dismissing plaintiffs' suits for lack of timely filing of individual claims with the Equal Employment Opportunities Commission.

Reversed and remanded as to ADEA claims; dismissal of Braun's non-ADEA claims affirmed.

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SAMUEL A. MARCOSSON, Wash., D.C. (Charles A. Shanor, Gen. Counsel, Gwendolyn Young Reams, Assoc. Gen. Counsel, Vincent J. Blackwood, Asst. Gen. Counsel, Donna J. Brusoski, Equal Employment Opportunity Commission, Wash., D.C., on the brief), for *amicus curiae* EEOC.

(STEVEN S. ZALEZNICK, Cathy Ventrell-Monsees, and Sally Dunaway, Wash., D.C., filed a brief for *amicus curiae* AARP.)

JON O. NEWMAN, *Circuit Judge*:

The primary issue on these appeals is whether the administrative charges, usually called "claims," filed by named plaintiffs in a suit instituted as a class action under the Age Discrimination in Employment Act (ADEA) satisfy the claim filing obligations of individual plaintiffs alleging similar grievances, despite decertification of the class. The issue arises on appeals by eighteen former employees of Xerox Corporation from the February 15, 1990, judgments of the District Court for the Western District of New York (David G. Larimer, Judge) dismissing their ADEA suits against Xerox for lack of timely filing of individual claims with the Equal Employment Opportunities Commission (EEOC). We conclude that the claims filed by the named plaintiffs in the putative class action suffice to permit the individual

suits to go forward without filing additional claims. We therefore reverse and remand.

Background

Section 7(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section [authorizing civil actions] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies [arising in so-called "deferral states," which have a state statute prohibiting age discrimination], within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(d) (1988). All parties agree that in the pending cases 300 days is the relevant period for filing a charge with the EEOC.

The eighteen appellants were terminated from Xerox on various dates between November 1, 1981, and July 11, 1983, as a result of extensive reductions in force throughout the company. None of them filed a charge within 300 days of their respective dates of termination. However, on January 7, 1982, within 300 days of the earliest discharge, four other former Xerox employees filed administrative charges with the EEOC and subsequently filed a class action in the District of New Jersey, styled *Lusardi v. Xerox Corp.*, alleging age discrimination by Xerox in connection with the reduction in force. On January 31, 1984, a class was conditionally certified in the *Lusardi* suit consisting of

> All salaried employees in the forty (40)—seventy (70) age group who in the period May 1, 1980 through March 31, 1983 have been terminated or required to retire from employment at an age less than seventy or have been denied equal employment opportunities for promotion at any unit, division or American subsidiary of Xerox Corporation and who contend that such termination, retirement or denial of promotion was caused by age discrimination policies or practices of Xerox Corporation.

See Lusardi v. Xerox Corp., 747 F.2d 174, 175 n.1 (3d Cir. 1984).

ADEA class actions are subject to the "opt in" procedure of section 16(b) of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b) (1988)); *Pandis v. Sikorsky Aircraft Division*, 431 F. Supp. 793, 796 (D. Conn. 1977). In the *Lusardi* class action, 1,312 individuals, including the 18 appellants, filed the written consents necessary to opt into the

Lusardi class.[1] Thereafter the *Lusardi* class was decertified. *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *modified on petition for mandamus sub nom. Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir. 1988), *decertification adhered to after mandamus*, 122 F.R.D. 463 (D.N.J. 1988). The notice of decertification advised members of the decertified class that the statute of limitations for their individual lawsuits would be tolled from the date each opted into the *Lusardi* suit until December 23, 1988. The decertification notice did not advise members of the decertified class with respect to the 300-day requirement for filing an administrative claim.

The 18 appellants then filed individual ADEA lawsuits in the Western District of New York. Judge Larimer granted Xerox's motion to dismiss in each action for failure of each appellant to have filed a claim within 300 days of discharge. The District Judge rejected appellants' argument that they should have the benefit of the timely notice filed by the named plaintiffs in the *Lusardi* class action. Such "piggybacking," he ruled, should not be allowed for members of a decertified class, though it is allowed for members of a viable class, *see Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52-53 (3d Cir. 1989); *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1016 (7th Cir. 1988); *Bean v. Crocker National Bank*, 600 F.2d 754, 759-60 (9th Cir. 1979).

Judge Larimer also declined to deem the 300-day period tolled for any of the appellants. As to 17 of the appellants, he noted that the 300-day period had already

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1 We are not informed how those of the appellants terminated after March 31, 1983, the ending date of the class definition, became eligible to opt into the *Lusardi* class, but Xerox does not dispute that all appellants did opt in.

expired before each opted into the *Lusardi* class action. As to appellant Alfonse Oliveri, who opted into the *Lusardi* class action within 300 days of his discharge, Judge Larimer ruled that his failure ever to file an administrative claim barred his suit.

Discussion

The filing requirement of the ADEA was to a large extent modeled after the filing provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988). *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). It contains two provisions that function like statutes of limitations. Section 7(e)(1) of the ADEA, 29 U.S.C. § 626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255 (1988), establishes a limitations period for filing suit of two years after the cause of action accrues or three years in the case of a willful violation. In addition, section 7(d) of the ADEA sets the time limits for filing an administrative charge with the EEOC—180 days after the alleged unlawful practice occurred, or 300 days after such date in deferral states like New York. *See Miller v. International Telephone and Telegraph Corp.*, 755 F.2d 20, 23-24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985). Section 7(d) also requires a plaintiff to wait 60 days after filing a charge with the EEOC before bringing a suit in the district court.

As originally enacted, section 7(d) provided that a suit could not be commenced "by any individual under this section until *the individual* has given" at least 60 days notice to the Secretary of Labor, who was then charged with enforcement of the Act. Pub. L. No. 90-202, 81

Stat. 602, 605 (1967) (emphasis added). In 1978, Congress amended section 7(d) to eliminate the requirement that "the individual" bringing suit must have given the administrative notice and provided instead that suit could not be brought until 60 days after "*a charge* alleging unlawful discrimination has been filed with the Secretary." Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (1978) (emphasis added). That same year the Secretary's ADEA responsibilities were transferred to the EEOC. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807, 92 Stat. 3781 (1978). In changing the statutory requirement from a charge filing obligation of the individual bringing suit to the more general requirement that "a charge . . . has been filed," Congress pointed out that "[f]ailure to timely file the notice . . . [was] the most common basis for dismissal of ADEA lawsuits by private individuals" and emphasized that the purpose of the amendment was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals . . . ." S. Rep. No. 493, 95th Cong., 1st Sess. 12 (1977).

Under the current version of section 7(d), courts have regularly held that the timely filing of an administrative charge by a named plaintiff in a class action satisfies the charge filing obligation of all members of the class. *See Lockhart v. Westinghouse Credit Corp.*, *supra*; *Bean v. Crocker National Bank*, *supra*. The same rule applies in Title VII class actions. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 389 n.6 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). In Title VII suits, the "single filing rule" is not limited to class actions but also permits aggrieved plaintiffs to join in a lawsuit brought by individuals who have filed a timely administrative charge provided the claims

" 'aris[e] out of similar discriminatory treatment in the same time frame.' " *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986) (quoting *Ezell v. Mobil Housing Board*, 709 F.2d 1376, 1381 (11th Cir. 1983)). *See De Medina v. Reinhardt*, 686 F.2d 997, 1012-13 (D.C. Cir. 1982); *Crawford v. United States Steel Corp.*, 660 F.2d 663, 665-66 (5th Cir. 1981); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 882-83 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977).

Though the parties on this appeal have focused primarily on the issue of whether the decertification of the *Lusardi* class precludes the appellants from enjoying the benefit of the administrative charges filed by the *Lusardi* named plaintiffs, we think the issue is really the one emphasized by the EEOC as *amicus curiae*—whether the appellants may benefit from the notice given by the *Lusardi* named plaintiffs, irrespective of the class action that those plaintiffs endeavored to maintain. That issue involves three distinct questions: (1) Whether the "single filing rule," available to those who join as plaintiffs in individual actions under Title VII, is available under the ADEA? (2) If so, whether the "single filing rule" is available to ADEA plaintiffs initiating individual suits instead of joining as plaintiffs in an existing suit? (3) If so, whether the administrative claims of the *Lusardi* named plaintiffs suffice to secure the benefit of the "single filing rule" for the 18 appellants?

Application of the "single filing rule" to ADEA individual actions is fully warranted. The ADEA administrative procedure is modeled on the Title VII procedure, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 395 n.11. Since the rule has been applied to ADEA class actions by analogy to its application to Title VII class

actions, it is equally appropriate to apply it to ADEA individual actions by analogy to its application to Title VII individual actions. Moreover, the EEOC has interpreted the ADEA filing requirements to be satisfied "so long as the matter complained of was within the scope of [a] previously filed charge, regardless of who filed it." 43 Fed. Reg. 138, 139 (1983). The EEOC's interpretation of the ADEA is entitled to the same deference accorded to its interpretation of analogous Title VII provisions. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979).

The purpose of the administrative charge requirement is to afford the agency the opportunity to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d). If the agency charged with that task is satisfied that a timely filed administrative charge affords it sufficient opportunity to discharge these responsibilities with respect to similar grievances, it serves no administrative purpose to require the filing of repetitive ADEA charges any more than repetitive Title VII charges, *see Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968), at least in the absence of statutory language compelling such a result.

The further question is whether the single filing rule may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as co-plaintiff or intervenor. If the single filing rule is to be available in non-class ADEA actions, we see no reason to limit its use to those electing to join preexisting lawsuits. The purpose of the charge filing requirement is fully served by an administrative claim

that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit or initiate their own. It is true that under Title VII, the single filing rule has been used only to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge. But, as the EEOC points out, that consequence flows from Title VII's requirement that no person may initiate a Title VII suit without obtaining a right-to-sue letter, 42 U.S.C. § 2000e-5(f)(1), which ordinarily requires timely filing of an administrative charge. *See Inda v. United Air Lines, Inc.*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). There is no comparable requirement for ADEA suits and therefore no reason to require ADEA plaintiffs seeking to benefit from the single filing rule to join preexisting individual suits.

The final question is whether the administrative claims filed by the *Lusardi* named plaintiffs suffice to secure the benefit of the "single filing rule" for the 18 appellants. Courts have used different tests, either alone or in combination, for determining whether an administrative charge suffices to permit piggybacking by a subsequent plaintiff. The broadest test requires only that the claims of the administrative claimant and the subsequent plaintiff arise out of the same circumstances and occur within the same general time frame. That is the test we used in *Snell* in permitting piggybacking by correctional officers alleging discrimination in a county jail. A somewhat narrower test requires that the administrative claim give notice that the discrimination is "class-wide," *i.e.*, that it alleges discrimination against a class of which the subsequent plaintiff is a member. *See Kloos v. Carter-Day Co.*, 799 F.2d 397, 401 (8th Cir. 1986) (alternate stan-

dard). A still narrower test requires that the administrative claim not only allege discrimination against a class but also allege that the claimant purports to represent the class or others similarly situated. *See Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981).

Where the grievances arise in a work unit of modest size, like the jail in *Snell* or the union local in *Allen v. Amalgamated Transit Union Local 788, supra*, we agree that mere similarity of the grievances within the same general time frame suffices to permit the "single filing rule." As former Judge Bell asked in the context of claims by employees at a single plant, "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." *Oatis v. Crown Zellerbach*, 398 F.2d at 498. However, where the grievances are alleged to arise throughout a large group[2], the lack of conciliation of one individual grievance does not necessarily mean that conciliation efforts would be unavailing if the EEOC and the employer were alerted to the broad scope of the claim. Though we do not think the administrative claim in such circumstances need specify that the claimant purports to represent a class or others similarly situated, there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim. Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group.

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2 In the Title VII context, claims have sufficed for purposes of the single filing rule even though the claimants were employees of an agency as large as the United States International Communication Agency, *De Medina v. Reinhardt, supra*.

Since the pending cases involve plaintiffs scattered throughout the defendant's domestic employment, the notices on which they seek to piggyback will suffice only if they alerted the EEOC and Xerox to the broad scope of the grievance. Lusardi's charge, filed on January 7, 1982,[3] *see Lusardi v. Xerox Corp.*, 118 F.R.D. at 378, alleged that Xerox had discriminated "against persons such as myself over forty *as a class* particularly with respect to the implementation of a reduction in salaried work force." *Lusardi v. Lechner*, 855 F.2d 1062, 1078 (3d Cir. 1988) (emphasis added). The *Lusardi* plaintiffs alerted the EEOC to their claim that Xerox had discriminated on the basis of age against those between 40 and 70 in carrying out its extensive reduction in force between 1981 and 1983. As the Third Circuit observed in ruling that Judge Lechner had erred in relying on the absence of individual timely administrative claims in decertifying the *Lusardi* class, Lusardi's charge "provides sufficient notice to the parties to encourage meaningful conciliation, the purpose of requiring it." *Id.* We agree with that characterization.[4] In assessing the adequacy of a charge for purposes of the single filing rule, the question is whether "it can fairly be said that no

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3 Since the charge was filed within 300 days of the date of the earliest discharge of any of the 18 appellants, we need not consider whether the single filing rule would be available to revive the claim of a plaintiff discharged more than 300 days prior to the filing of the administrative claim on which he seeks to piggyback.

4 We do not understand this characterization of the claim to be a ruling by the Third Circuit, binding appellants or Xerox, that the Lusardi notice suffices to permit piggybacking by the 18 appellants here. Indeed, the Third Circuit pointed out that the District Court in New Jersey (and presumably the appellate court as well) lacked jurisdiction to determine the merits of the individual claims of the members of the decertified class, and that such matters remained for determination in the forum in which individual claims are presented. *Lusardi v. Lechner*, 855 F.2d at 1079.

conciliatory purpose would be served by filing separate EEOC charges." *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981). Once the attention of the EEOC and Xerox had been drawn to the claim of the *Lusardi* plaintiffs that age discrimination had occurred throughout the company in implementing the reduction in force, there is no reason to think that conciliation would have been more likely if these 18 appellants had filed individual claims.

Xerox strenuously urges that from this notice it could not possibly determine the number or identity of those discharged employees who would later claim similar discrimination. We do not think that is the test of whether a claim suffices to invoke the single filing rule. The question is whether the timely filed claims provided an adequate opportunity to satisfy the statutory tasks imposed upon the EEOC. Central to those tasks is an attempt to conciliate the grievances. When the *Lusardi* named plaintiffs filed their charges, the EEOC was on notice that Xerox stood accused of implementing its reduction in force during the years 1981 through 1983 by discriminating on the basis of age against those aged 40 to 70. The *Lusardi* plaintiffs did not purport to be complaining of isolated instances of age discrimination. Rather, they alerted the EEOC to a claim of age discrimination throughout the company's domestic operations. Their claims provided the Commission with ample opportunity to conciliate the broad grievance. Though conciliation did not occur, there is no reason to think that it would have succeeded if Xerox had known the exact number or the names of those who would subsequently advance the same claim. In such circumstances, it would be "wasteful," *Oatis v. Crown Zellerbach*, 398 F.2d at 498, and "nonsensical," *Allen v. Amalgamated*

Transit Union Local 788, 554 F.2d at 883, to flood the EEOC with repetitive notices from these 18 appellants and hundreds of other discharged Xerox employees, all making the same claim already lodged with the Commission as a classwide grievance by the *Lusardi* named plaintiffs.

Judge Larimer appears to have rejected the availability of the single filing rule in the pending cases largely on the ground that Judge Lechner had stated, in the *Lusardi* class decertification ruling, that the members of the proposed class "are not similarly situated," 118 F.R.D. at 352, a conclusion based in part on the fact that they performed different jobs in different departments and locations. But whatever differences among the discharged employees might suffice to preclude class certification do not necessarily defeat application of the single filing rule. There are many reasons for declining to proceed with a class action, including difficulties in managing the action and variation among defenses. Indeed, the Third Circuit understood Judge Lechner to have found the putative class members not similarly situated in part because of the possibility of differing defenses. *Lusardi v. Lechner*, 855 F.2d at 1067; *see Lusardi v. Xerox Corp.*, 118 F.R.D. at 375. Though a class action may not be suitable, the claims of these 18 appellants are nonetheless sufficiently similar to those of the original named plaintiffs to satisfy the purposes of the notice filing requirement. In this essential respect, the circumstances presented here are indistinguishable from other instances in which piggybacking has been permitted. Moreover, the fact that the agency responsible for attempting conciliation is completely satisfied that the purposes of section 7(d) were served by the original notices, though not conclusive, is entitled to

considerable weight. In the Commission's view, "the claims raised by [the appellants] appear to fall squarely within the allegations raised by the charges of the *Lusardi* plaintiffs." Brief for EEOC as *amicus curiae* at 14.

Nor need we have concern that application of the single filing rule will oblige Xerox to defend against stale claims. The ADEA statute of limitations provides adequate assurance that stale claims will not remain viable. The charge filing requirement of section 7(d) sets a time limit, not for the purpose of limiting time for suit, but for the purpose of affording a prompt opportunity to attempt conciliation. That opportunity existed within the 300 days specified in section 7(d).

In sum, we hold that the administrative charges filed by the *Lusardi* named plaintiffs satisfied the appellants' obligation under section 7(d) of the ADEA.

There remain two separate issues concerning claims of appellant Paul F. Braun. His claim of discrimination on the basis of a medical condition, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), was properly dismissed since Xerox's receipt of Army procurement contracts does not render the company a "program or activity receiving federal financial assistance" within the meaning of the Act. *See* 28 C.F.R. 41.3(e), 45 C.F.R. 84.3(h) (1989); *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981). Braun's state law fraud claim, dismissed for lack of pendent jurisdiction after dismissal of his ADEA claim, need not be reinstated since it is barred by New York's six-year statute of limitations. N.Y. Civ. Prac. L. & R. §§ 203(f), 213(8) (McKinney 1990).

The judgments dismissing appellants' ADEA claims are reversed and remanded for further proceedings. Dismissal of Braun's Rehabilitation Act and fraud claims is affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AARON ALESZCZYK, AS EXECUTOR OF THE ESTATE OF RONALD F. ALESZCZYK, DECEASED,

Plaintiff,

DECISION AND ORDER

v.

Civ. 89-679L

XEROX CORPORATION,

Defendant.

JOHN BENNETT,

Plaintiff,

v.

Civ. 89-889L

XEROX CORPORATION,

Defendant.

WILLIAM BRANT,

Plaintiff,

v.

Civ. 89-957L

XEROX CORPORATION,

Defendant.

PAUL F. BRAUN,

Plaintiff,

v.

Civ. 89-1385L

XEROX CORPORATION,

Defendant.

JAMES CARROLL,

Plaintiff,

v.

Civ. 89-955L

XEROX CORPORATION,

Defendant.

JAMES DAMMEN,

Plaintiff,

v.

Civ. 89-1002L

XEROX CORPORATION,

Defendant.

CHARLES DOLCIMASCOLO,

Plaintiff,

v.

Civ. 89-1003L

XEROX CORPORATION,

Defendant.

HELEN A. FORDHAM,

Plaintiff,

v.

Civ. 89-889L

XEROX CORPORATION,

Defendant.

JOSEPH GOLOSSI,

Plaintiff,

v.

Civ. 89-1051L

XEROX CORPORATION,

Defendant.

PAUL J. MITTAK,

Plaintiff,

v.

Civ. 89-1156L

XEROX CORPORATION,

Defendant.

ALFONSE OLIVERI,

Plaintiff,

v.

Civ. 89-1053L

XEROX CORPORATION,

Defendant.

WALTER L. PIDEK,

Plaintiff,

v.

Civ. 89-914L

XEROX CORPORATION,

Defendant.

ALFRED E. RIZZARI,

Plaintiff,

v.

Civ. 89-1087L

XEROX CORPORATION,

Defendant.

DONALD SCHAEFER,

Plaintiff,

v.

Civ. 89-890L

XEROX CORPORATION,

Defendant.

HAROLD SIEBERT,

Plaintiff,

v.

Civ. 89-1052L

XEROX CORPORATION,

Defendant.

PETER N. TOLLIVER,

Plaintiff,

v.

Civ. 89-887L

XEROX CORPORATION,

Defendant.

LAWRENCE L. TRAVIS,

Plaintiff,

v

Civ. 89-956L

XEROX CORPORATION,

Defendant.

RICHARD B. VAN MAAREN,

Plaintiff,

v.

Civ. 89-915L

XEROX CORPORATION,

Defendant.

LEON A. WIATER,

Plaintiff,

v.

Civ. 89-888L

XEROX CORPORATION,

Defendant.

INTRODUCTION

These cases involve allegations of discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. Plaintiffs are all former employees of defendant Xerox Corporation, having been terminated from their positions by means of voluntary (VRIF) and involuntary (IRIV) reductions in force between 1981 - 1983. Defendant has moved to dismiss a total of 19 different suits brought individually

alleging ADEA violations. Because the principal bases for defendant's motions to dismiss are the same in all cases -- the failure of all plaintiffs to timely file an administrative claim with the EEOC -- I have joined the cases for argument and decision of the motions. Two of the plaintiffs, the Estate of Ronald Aleszczyk (hereinafter "Aleszczyk") and Paul F. Braun, have raised separate issues not germane to the other plaintiffs and those issues will be treated here as well.

I. FACTS

A. General Background Concerning All Parties.

All 19 plaintiffs allege that they were terminated from Xerox between November 1, 1981 and July 11, 1983 as part of IRIF and VRIF programs at Xerox.

None of the plaintiffs filed individual lawsuits alleging age discrimination until the instant suits were commenced in the Western District of New York in 1989. None of the plaintiffs individually filed a charge of unlawful discrimination with the EEOC within the 300-day period required by the statute, 29 U.S.C. §626(d)(2).

Fifteen of the plaintiffs eventually filed claims with the EEOC; 4 have never filed such a claim. Of the 15 who did file, the dates of filing range from 392 days after the alleged discriminatory act (plaintiff Bennett) to 2,655 days thereafter (plaintiff Schaefer). Nine plaintiffs filed more than 2,000 days after the alleged discriminatory act.

On or about March 8, 1983, four representative plaintiffs (none of the

plaintiffs here) commenced a class action against Xerox alleging age discrimination in the United States District Court for New Jersey. This action, entitled Lusardi, et al v. Xerox Corporation ("Lusardi"), was conditionally certified as a class action on or about January 31, 1984. Eventually approximately 1,312 individuals, including all 19 plaintiffs before me, filed written consents to "opt in" to the New Jersey case as class members. All 19 of these plaintiffs opted in to the Lusardi action during the 6-month period from November 26, 1983 to May 8, 1984.

The class was decertified 3 years later, after extensive discovery concerning 51 sample plaintiffs, by United States District Judge Alfred J. Lechner, Jr. on November 5, 1987.

Lusardi v. Xerox Corp., 118 F.R.D. 351 (D.N.J. 1987).

The Third Circuit declined to exercise jurisdiction over the appeal, but the Court did issue an order of mandamus directing Judge Lechner to reconsider his decertification decision. The Third Circuit determined that it was error for Judge Lechner to have relied in part on the fact that many class members had not timely filed EEOC claims in determining whether the case should be maintained as a class action. The Court held that unnamed class members could rely on the timely filing of EEOC charges by the named representative plaintiffs and that the class members would not be barred from participating in the class action because of their individual failure to file. See Lusardi v. Lechner, 855 F.2d 1062, 1077-78 (3rd Cir. 1988).

On remand, Judge Lechner reaffirmed his decision to decertify the class because he determined that the members of the proposed class were not similarly situated and that therefore, a class action was inappropriate.

As part of the decertification notice, the district court advised class members that for purposes of commencing individual age discrimination claims, the statute of limitations would be tolled until December 23, 1988. This notice made no specific reference to the 300-day administrative filing requirement.

B. Plaintiff Aleszczyk

Ronald Aleszczyk was employed by defendant Xerox from 1963 until his August 1982 VRIF termination. Plaintiff was 42 years old at the time of his

termination, and held the position of Senior Project Engineer - Mechanical.

On March 30, 1984, Aleszczyk filed his written consent to opt in to the Lusardi class action. On May 14, 1984, subsequent to his opting in to Lusardi, plaintiff filed an administrative charge with the EEOC alleging age discrimination in violation of ADEA. Aleszczyk filed this charge nearly two years after his termination.

Plaintiff in his second cause of action alleges that in June of 1984 Xerox unlawfully retaliated against him for joining the class action and filing with the EEOC. Essentially, plaintiff alleges that Xerox refused to rehire him on a contract basis because of his prior actions. Plaintiff timely filed a charge alleging this violation of ADEA with the EEOC on August 3, 1984.

Finally, as a third cause of action, Aleszczyk contends that Xerox terminated him in 1982 for discriminatory reasons based on his status as a disabled veteran. Although no statutory basis for this claim is cited in the complaint, plaintiff subsequently claimed in his motion papers that Xerox had violated the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) and the regulations set forth in 41 CFR § 60-250.4 et seq.

Plaintiff filed the complaint alleging these three claims on June 9, 1989.

C. Plaintiff Braun

In his complaint filed October 20, 1989, Braun alleges ADEA violations against defendant Xerox on the basis of facts similar to those underlying

plaintiff Aleszczyk's complaint. Braun maintains that his August 15, 1982 termination from his position as a Senior Component Engineer & Technical Specialist - Component Engineering, as part of an "involuntary reduction in force" (IRIF) program, was discriminatorily motivated. At the time of his termination, plaintiff Braun was 50 years old.

Like Aleszczyk, Braun opted in to the Lusardi action, on May 7, 1984. Unlike Aleszczyk, however, Braun never filed an administrative charge with the EEOC. Braun contends that on or about May 10, 1983, he attempted to file with the agency, but failed because the EEOC never remitted to him the appropriate materials and forms. After opting in to Lusardi, plaintiff again tried to file a claim, only to have the EEOC refuse to

accept his claim apparently because he was a member of the class in Lusardi.

Braun also alleges that the decision to terminate him was based on his medical handicaps, consisting of arthritis and a blood disorder, which he contends had no adverse affect on his performance. Thus, plaintiff claims that defendant also has violated the Rehabilitation Act of 1973.

Braun's third claim is grounded in common law fraud. He points to an April 1982 statement made by Xerox to a funding company, to which plaintiff had applied for a mortgage, that the outlook for plaintiff's continued employment at Xerox was "good." Plaintiff alleges that he relied on this statement to his detriment in entering into the mortgage agreement, and was subsequently damaged by his August termination.

II. DEFENDANT'S MOTIONS

Xerox has moved to dismiss, or in the alternative for summary judgment, in all the actions, on all claims. Plaintiffs Braun and Aleszczyk have cross moved for summary judgment.

A. ADEA claims

Defendant's motion, at first blush, is deceptively simple. Xerox argues that none of the 19 plaintiffs involved in this action filed an administrative charge with the EEOC alleging age discrimination within 300 days of the allegedly discriminatory acts, as mandated by 29 U.S.C. § 626 (d). Section 626(d)(2) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [Equal Employment

> Opportunity Commission]. Such a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Because plaintiffs failed to comply with this statutory prerequisite to suit in federal court, maintains defendant, this court must dismiss these actions as a matter of law.

Were it not for the complicating effect of the Lusardi class action, this decision would fill but a page or two. The 300-day EEOC filing requirement operates as a statute of limitations, compliance with which is mandatory and rigorously enforced. See Shockley v. Vermont State Colleges, 793 F.2d 478, 481 (2d Cir. 1986); Miller v. ITT, 755 F.2d 20 (2d Cir. 1985); Foster v. CBS Records, 109 F.R.D. 168 (S.D.N.Y. 1986).

In class actions there is an exception to this requirement. Lusardi and other cases have recognized that each member of a valid class action need not have complied with the 300-day filing requirement mandated by §626(d)(2) as long as the representative members of the class had timely filed a claim in full compliance with § 626. The class members can "piggyback" on the timely EEOC filing for purposes of the class action.

The issue before me then is this: should former opt-ins to a conditional, and ultimately decertified, class be permitted to "piggyback" on the timely EEOC filing of the named plaintiff for the purpose of proceeding with their subsequent individual claims? On the facts of this case, the court is compelled to answer this question in the negative.

In actions for age discrimination, the 300-day EEOC filing requirement is a rigid, strictly adhered-to statutory prerequisite to the filing of a complaint. It must be recognized that "[l]imitations provisions are as much a part of Congressional intent as the creation of the cause of action." Foster, supra, 109 F.R.D. at 171. Although plaintiffs argue strenuously that "fairness" requires that I accord paramount importance to Congress' intent to grant broad relief in matters of age discrimination, it would be erroneous, especially on the facts of this case, to ignore Congress' equally well-expressed intention to bar suits brought on the basis of accusations of discriminatory motive which are leveled years after the adverse employment decision has been made. See Foster, 109 F.R.D. at 170.

Courts historically have excused plaintiffs of their administrative filing obligations only in narrowly defined, exceptional circumstances. Most commonly, the time period has been extended where there is evidence that an employer, through some wrongful act, has caused a plaintiff's failure to file timely. The doctrines of "equitable tolling" and equitable estoppel only apply where the facts show that an employer somehow either fraudulently concealed the existence of a cause of action or wrongfully prevented a terminated employee from exercising his rights. See Cerbone v. ILGWU, 768 F.2d 45, 48-49 (2d Cir. 1985); O'Malley v.

GTE Service Corp., 758 F.2d 818, 822 (2d Cir. 1985)[1]

Plaintiffs have made no such showing here. To the contrary, evidence in the record indicates that Xerox complied fully with its statutory and regulatory obligation to post in the workplace written notices informing employees of their rights and obligations under ADEA. See Affid. of John Kepnar, sworn to on October 11, 1989, at p. 7; 29 U.S.C. §627.

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1 Regarding the statutory requirement under Title VII that a plaintiff bring a civil action within 90 days of receipt of a right-to-sue letter, the Court of Appeals has said "in the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." Johnson v. AL Tech Specialties Steel Corp., 731 F.2d 143, 146 (2d Cir. 1984), quoting Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982).

Plaintiff Aleszczyk's contention that Xerox never personally counselled him or advised him of his rights under federal law in no way affects the analysis; aside from the posting obligation, "[t]here is no statutory requirement that an employer inform individual employees of their rights under the ADEA." Seedman v. Alexander's, Inc., 683 F.Supp. 924, 927 (S.D.N.Y. 1987).

It cannot seriously be argued that the plaintiffs in this case in any way relied on the filing of the Lusardi case in declining to file their own charges with the EEOC within the requisite 300 days. The record reveals that 18 of the 19 plaintiffs before me opted in to that action more than, and in most cases many

more than 300 days after the alleged discriminatory acts.[2] For example, plaintiff Helen Fordham apparently filed her written consent to join Lusardi 880 days subsequent to her termination. It strains credulity to suppose that this plaintiff deferred acting because she relied on the filing of Mr. Lusardi, of whose lawsuit she would not become aware for 2 1/2 years after her termination.

---

2 The parties concede that plaintiff Oliveri filed his consent to opt in to Lusardi within 300 days of his termination. Nevertheless, the court is compelled to dismiss his claim along with the others because in responding to defendant's motion he has failed to come forth with any proof, other than his own complaint, that he ever filed an administrative charge with the EEOC. To the extent Xerox has moved for summary judgment, I find that plaintiff has failed to meet his burden of coming forth with sufficient facts to show that a genuine issue of material fact remains for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

In sum, plaintiffs have presented no reason why this court should depart from enforcing the rigid 300-day EEOC filing requirement imposed by ADEA. The doctrines of equitable tolling or estoppel do not apply on the instant facts, and plaintiffs cannot show that they relied in any way on the actions of the representative plaintiffs in the Lusardi class action.

Nevertheless, the anomalous result remains that, if these plaintiffs had been allowed to proceed as a class in the Lusardi action, the filing by the named plaintiff would have sufficed to fulfill the requirement for all unnamed class members. Why should the mere fact that the class was eventually decertified then summarily deprive the former opt-ins of their right to "piggyback" on the EEOC filings of others?

The answer lies in the rationale behind the EEOC filing requirement as it relates to the circumstances of a class action. Aside from serving to bar stale and tardy claims, the filing requirement operates to notify the EEOC and the defendant of the plaintiff's allegations, thus enabling the EEOC to perform its conciliatory function, which in turn is intended to reduce litigation. See Anderson v. Montgomery Ward & Co., 631 F.Supp. 1546, 1548 (N.D. Ill. 1986).

Courts have long recognized that unnamed class members may "piggyback" on the filing of the named plaintiffs because all plaintiffs in a class action are similarly situated and have identical claims. See Bean v. Crocker National Bank, 600 F.2d 754, 759 (9th Cir. 1979); Oatis v. Crown Zellerbach Corp., 398 F.2d 494 (5th Cir. 1968)

(Title VII case). In the class action context, because all plaintiffs are similarly situated, notice to the EEOC and to a defendant of one plaintiff's claim serves as notice of the claims of all. As is evident from the District Court's decision in the class action to decertify the class, former Xerox employees terminated via the IRIF and VRIF programs instituted in the early 1980s were not in fact similarly situated. The District Court in Lusardi discussed this:

> Because it appears the members of the proposed class come from different departments, groups, organizations, units and local offices, as well as different subsidiaries of Xerox, performed different jobs at different geographic locations, were the subject of different job actions concerning reductions in the Xerox workforce (including resignations, promotions, terminations for cause, etc.) which occurred at various times as a result of decisions by different supervisors made on a decentral-

> ized employee-by-employee basis, plaintiffs are not similarly situated.

Lusardi v. Xerox Corp., 118 F.R.D. 351, 352 (D.N.J. 1987).

The court having found plaintiffs not to be similarly situated in New Jersey for purposes of the class action, it can be presumed that they are not so situated here, when they bring individual suits. Therefore, the rationale that allows non-filing individual litigants to ride on the coattails of those who file timely charges in class actions does not apply.

Plaintiffs argue that this rule elevates form over substance; that is, that, procedural technicalities aside, the EEOC and Xerox have received adequate notice of the claims involved here, insofar as all the plaintiffs opted into the class action many years ago. Plaintiffs, however, ask the Court

to assume too much. Not one of the plaintiffs in these actions has affirmatively shown that either Xerox or the EEOC was aware specifically of his individual claims before he filed either an EEOC charge or the instant individual complaint. As is evident from the Lusardi decertification opinion, discovery with respect to the class only covered a "sample group" of 51 employees; no plaintiff here has offered proof that he or she was a member of that group. While Xerox might have had these plaintiffs' name on a list, this does not necessarily amount to the notice contemplated by ADEA.

Today's result might differ if plaintiffs had opted in to the class action before their 300-day limitations periods had expired. In that event, I would have to decide whether their opting-in had the effect of tolling that

period, and if so, for how long. But the facts are the facts. For what surely is a variety of reasons, these plaintiffs decided not to file administrative charges within 300 days of their terminations or bring individual lawsuits until after the class action terminated. On the day that these plaintiffs received notice of the opportunity to join the class action, they had each long since relinquished their rights to file charges with the EEOC and commence their own individual ADEA action in federal court. When the notice concerning the pending class action arrived in the mail, plaintiffs, with little risk and much to gain determined to "opt in" and essentially enjoy the benefits of a "free ride" in that litigation.

My decision today in no way disadvantages plaintiffs. Plaintiffs

are in no worse a position than that they occupied the day before opting in to the class action. At that time, their circumstances were such that they were barred from bringing individual ADEA claims. At that time, their only remedy was to opt in to a proper ADEA class action filed by someone else. When that action terminated, their rights as class members terminated as well.

B. Aleszczyk's Retaliation and Veteran's Claims

1. Retaliation

The parties do not dispute that, with respect to plaintiff Aleszczyk's claim of wrongful retaliation in June 1984, he filed a timely charge with the EEOC. Xerox makes its motion, however, on the ground that the statute of limitations regarding the time in which

a plaintiff must file his civil complaint has run.

The statute of limitations with respect to ADEA claims is imposed in this instance by 29 U.S.C. § 626 (e), which in turn, incorporates the provisions of §§ 255 and 259 of that title. Section 255 (a) requires that actions such as the one at bar be brought within two years after the cause of action accrues, or within three years in the case of willful violations. Moreover, Section 626(e)(2) of Title 29 U.S.C. provides for an additional extension of up to one year while the EEOC is attempting reconciliation.

Defendant maintains that, giving plaintiff the benefit of all doubts, he would have had four years within which to file his civil complaint. Since the alleged retaliation occurred in June of

1984, Xerox asserts that plaintiff's June 1989 complaint is time barred.

Plaintiff may not avail himself of the tolling of this limitations period allowed by the notice of decertification in the Lusardi action. The conditional certification of a class in that suit covered only claims accruing for a period of time before May 31, 1983. Therefore, to toll the limitations period as it relates to this claim is wholly illogical.

Plaintiff argues, however, that the Age Discrimination Claims Assistance Act of 1988, Pub. L. 100-283, 102 Stat. 78, (ADCAA) adds a 540-day "window" period, commencing April 7, 1988, during which he may file his retaliation claim. Congress passed ADCAA to redress the effects of mismanagement by the EEOC of age-based discrimination claims. See Turgeon v. Rush-Presbyterian-St. Luke's

Medical Center, 1989 U.S. Dist. LEXIS 14856 (N.D. Ill. 1989).

ADCAA enumerates several conditions which must be met before a claimant can receive the benefit of the Act's tolling provisions.[3] The Court finds all such conditions to have been met in this case.

---

3 The Act provides in relevant part:

SEC. 3. EXTENSION OF STATUTE OF LIMITATIONS.

> Notwithstanding section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626[e]), a civil action may be brought under section 7 of such Act by the Commission or an aggrieved person, during the 540-day period beginning on the date of enactment of this Act if --
>
> (1) with respect to the alleged unlawful practice on which the claim in such civil action is based, a charge was timely filed under such Act with the Commission after December 31, 1983,

> (2) the Commission did not, within the applicable period set forth in section 7(e) either --
>
> (A) eliminate such alleged unlawful practice by informal methods of conciliation, conference, and persuasion, or
>
> (b) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim,
>
> (3) the statute of limitations applicable under such section 7 (e) to such claim ran before the date of enactment of this Act, and
>
> (4) a civil action on such claim was not brought by the Commission or such person before the running of the statute of limitations.

Defendant argues that plaintiff should not reap the benefits of the tolling provisions in ADCAA because his charge is no longer pending with the EEOC. That is, defendant asserts that since the EEOC, on June 4, 1986, informed plaintiff's attorneys by letter that the agency intended to discontinue

action on the plaintiff's claim due to his having filed suit, the tolling provisions do not apply by virtue of § 3(2)(b) of the Act. See, n.3, supra.

Defendant, however, misinterprets ADCAA. Section 3(2)(b) of the Act permits tolling if the Commission fails to notify a claimant of the disposition of his charge or eliminate the unlawful practice "within the applicable period set forth in section 7(e) [29 U.S.C. § 626(e)]."

Because § 626(e) makes reference to more than one time period, this language of ADCAA is somewhat unclear. Section 626(e)(1) incorporates the provision of the Portal-to-Portal Act of 1947, codified at 29 U.S.C. §§ 255 and 259, in setting forth the basic two-year statute of limitations applicable to the filing of civil complaints under ADEA. In subsection (2) of § 626(e), however, the

statute provides for a tolling of the statute of limitations for the period during which the EEOC attempts conciliation, which period in no event is to exceed one year.

A reasonable reading of ADCAA would indicate that it is this latter, one-year period to which § 3(2)(b) refers. See EEOC v. Puerto Rico Job Corps., 1990 WL 2427 (D.P.R. 1990). As is admitted by Xerox, the EEOC did not send a letter to plaintiff regarding disposition of his charge until 1986, nearly two years after he had filed that charge. Therefore, § 3(2)(b) of ADCAA does not bar application of the tolling provisions to plaintiff's claim. The EEOC did not, within one year of the filing of the charge, notify plaintiff of the disposition of his claim. In sum, plaintiff's claim does receive the benefit of ADCAA's tolling provisions,

and, since the complaint was filed within the 540-day "window" period, defendant's motion to dismiss on statute of limitations grounds is denied.

2. Veteran Status

Aleszczyk also alleges that Xerox terminated him unlawfully on the basis of his status as a disabled veteran, in violation of VEVRAA, 38 U.S.C. § 2012, and the regulations promulgated thereunder, 41 C.F.R. 60-250.4 et seq. Plaintiff apparently suffers from tinnitus, a hearing disorder.

No court yet has held that a private right of action exists under VEVRAA. In fact, courts have held that individuals possess no such right, and that only the Department of Labor may sue under the statute. See Barron v. Nightingale Roofing, Inc., 842 F.2d 20 (1st Cir. 1988); De Leon Cruz v.

Loubriel, 539 F.Supp. 250 (D.P.R. 1982). The court in Barron observed that to allow a private right of action might well frustrate the orderly enforcement process set up by the regulations, which detail a specific sequence of procedures to be followed by the Department of Labor in handling veterans' complaints.

Moreover, those courts that have equivocated on the issue of the existence of a private right of action have found that complainants must first file a complaint with the Department of Labor before bringing suit. 41 C.F.R. 60-2250.26(a) provides, in relevant part that "[a]ny applicant for employment . . . or any employee . . . may . . . file a written complaint with the Veterans' Employment Service of the Department of Labor . . . alleging a violation of the Act or the regulations. . . . Such complaint is to be filed not later than

180 days from the date of the alleged violation." Plaintiff has filed no such complaint.

Although the word "may" suggests that administrative filing is permissive, courts construing this language have found exhaustion of administrative remedies to be a mandatory prerequisite to suit. See De Leon Cruz, 539 F.Supp. at 251; Marin v. New York State Department of Labor, 512 F.Supp. 353 (S.D.N.Y. 1981).

Therefore, because plaintiff cannot show that a private right of action exists, and because he has not filed a complaint with the Department of Labor, I find this cause of action to be without merit as a matter of law.

C. Braun's ADEA and Rehabilitation Act Claims

1. ADEA

Plaintiff Braun, in addition to joining the other plaintiffs' argument relating to opting in to the Lusardi class action, maintains that he attempted timely to file a charge with the EEOC alleging age discrimination, but was frustrated in his efforts by the agency itself. In an affidavit sworn to on December 26, 1989, Braun states that on May 10, 1983, he contacted the EEOC and was promised that appropriate materials necessary for filing a charge would be sent to him. He attests that none had been sent as of the date he consented to join the class action.

Braun has presented this court with no evidence of his encounter with the EEOC other than his own affidavit. In

any event, the burden is on the claimant to file a claim. This requirement is not excused by the facts here.

2. Rehabilitation Act claim

Plaintiff Braun alleges that in discriminating against him on the basis of his medical handicap, Xerox has violated the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794. The Act provides in relevant part:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (emphasis added).

Defendant argues, and I agree, that plaintiff has failed to allege that Xerox is a "program or activity receiving Federal financial assistance"

under the Act. Plaintiff apparently relies on Xerox' status as a recipient of various U.S. Army procurement contracts to support his contention that Xerox falls within the ambit of this section.

Federal regulations promulgated pursuant to the Act, as well as caselaw interpreting it, specifically exclude mere receipt of procurement contracts from the definition of "Federal financial assistance." 45 C.F.R. 84.3 (h) defines this term to be "any grant, loan contract (other than a procurement contract)" making federal funds available to recipients (emphasis added). See also Brown v. Sibley, 650 F.2d 760, 769 (5th Cir. 1981), citing Rogers v. Frito-Lay, Inc., 433 F.Supp. 200, 204 (N.D. Tex. 1977).

Even if I were to hold that mere allegations of receipt of procurement

contracts bring Xerox within the proscriptions of the Act, the Fifth Circuit in the oft-cited Brown decision held that a plaintiff must always allege more than that the overall entity discriminating against him receives federal financial assistance. The court wrote:

> it is not sufficient, for purposes of bringing a discrimination claim under section [794], simply to show that some aspect of the relevant overall entity or enterprise receives or has received some sort of input from the federal fisc. A private plaintiff in a section [794] case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 759.

Plaintiff's allegations with respect to Xerox rise nowhere near the level of specificity required by the

regulations and cases. Therefore, defendant's motion to dismiss this claim is granted.

D. State Law Claim

Having dismissed the federal claims for relief brought by plaintiff Braun, I decline to exercise pendent jurisdiction over state law claims.

CONCLUSION

For the reasons stated above, defendant Xerox' motion to dismiss plaintiffs' claims is GRANTED in its entirety as to all plaintiffs in these actions except that with respect to plaintiff Aleszczyk's retaliation claim, such motion is DENIED. Plaintiff Braun's

and Aleszczyk's cross motions for summary judgment are DENIED.

IT IS SO ORDERED.

/s/ David G. Larimer
DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
February 14, 1990

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of January one thousand nine hundred and ninety-one.

PETER N. TOLLIVER, LEON A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SIEBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, and RICHARD B. VAN MAAREN,

Plaintiffs-Appellants,

-V.-

XEROX CORPORATION, a New York Corporation,

Defendant-Appellee.

90-7201, -7203, -7205, -7211, -7213, -7215, -7221, -7223, -7225, -7231, -7233, -7235, -7241, -7243, -7245, -7253, -7281, -7251

ENTERED ON
JANUARY 24, 1991

PAUL F. BRAUN,
Plaintiff-Appellant,

-V.-

XEROX CORPORATION,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee XEROX CORPORATION, a New York Corporation.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and

that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

29 U.S.C. § 626(d)(1988) provides:

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed:

> (1) within 180 days after the alleged unlawful practice occurred; or
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and

shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(d)(1988).

29 U.S.C. § 216(b)(1988) provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such

action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

29 U.S.C. § 216(b)(1988).

PARTIES TO THE PROCEEDING

The following list sets forth the [parent and subsidiaries] (except wholly owned subsidiaries) of Xerox Corporation.

AMTX, Inc.

Advanced Forming Technology

Xerox Industrial e Comercial S.A.

Xerox do Nordeste S.A.

Xerox do Amazonas S.A.

Century Data Systems, Inc.

Copicentro S.A.

Copicentros, S.A.

GESCAN International

Katun Corporation

Kurzweil Applied Intelligence

Magua, S.A.

Optimem

Opto Generic Devices, Inc.

Rank Xerox Holding B.V.

Rank Xerox Investments Limited

Investissements Xerographiques Marocains S.A.

Reprographics Egypt Limited

Xerox Egypt S.A.E.

Xerox Maroc S.A.

Xerox Products Limited

R-X Holdings Limited

Xerox Shanghai Limited

Rank Xerox Limited

Fuji Xerox Co., Ltd.

Aichi Xerox Co., Ltd.

Aichi-Higashi Xerox Co., Ltd.

Akita Fuji OA Co., Ltd.

Chiba Xerox Co., Ltd.

Fuji System Brain Co. Ltd.

Fuji World Office Machine Co., Ltd.

Fukuoka Xerox Co., Ltd.

Fukushima Xerox Co., Ltd.

Gifu Xerox Co., Ltd.

Gunma Xerox Co., Ltd.

Hiroshima Xerox Co., Ltd.

Hokkaido Xerox Co., Ltd.

Hokuriku Office Machine Co. Ltd.

Hokuriku Xerox Co., Ltd.

Hyogo Xerox Co., Ltd.

Ibaraki Xerox Co., Ltd.

Kagoshima Xerox Co., Ltd.

Kanagawa Xerox Co., Ltd.

Kita Kyushu Xerox Co., Ltd.

Kobas Co. Ltd.

Korea Xerox Co., Ltd.

Kumamoto Xerox Co., Ltd.

Kyoto Xerox Co., Ltd.

MicCo Ltd.

Mie Xerox Co., Ltd.

Miyagi Xerox Co., Ltd.

Nagano Xerox Co., Ltd.

Nagaski Xerox Co., Ltd.

Niigata Xerox Co., Ltd.

Okayama Xerox Co., Ltd.

Osaka Xerox Co., Ltd.

Philipine Fuji Xerox Corp.

Protex Co. Ltd.

Saitama Xerox Co., Ltd.

Sakanao Office Machine Co. Ltd.

Shikoku Xerox Co., Ltd.

Shizuoka Xerox Co., Ltd.

Taiwan Fuji Xerox Corp.

Tama Xerox Co., Ltd.

Technol Co. Ltd.

Thai Xerographic Systems Co., Ltd.

Tochigi Xerox Co., Ltd.

Tokyo Xerox Co., Ltd.

Unisol Inc.

Indian Xerographic Systems Limited

Modi Xerox Limited

Epitec AB

Arguelles

Barcelona Inteligencia Art.

Bonanova

Cantabria

Castellon

Castilla Y La Rioja

Centro

Cia. Espanola Repro. y Serv.

Cia Levantina Intel. Artif.

Ciudad Lineal

Cuzco

Del Guadalquivir

Deusto

Ebro

Layetana

Les Corts

Levante

Llobregat

Los Remedios

Malaga

Meridiana

Mestalla

Mostoles

Nervion

Retiro

Salamanca

San Mames

Sistemas Expertas y Tecnolo.

Software Inteligente y Tratamiento Elect de Imp

Turia

Scaitech A/S

Xerox Partner Arhus A/S

Xerox Partner Esbjerg A/S

Xerox Partner Fyn A/S

Xerox Partner Herning A/S

Xerox Partner Horsholm A/S

Xerox Partner Nykobing A/S

Xerox Partner Trommesalen A/S

Xerox Partner Vejle A/S

Asunto Oy Kristiinanvalli

Rank Xerox (Nigeria) Limited

Rank Xerox Portugal Equipamentos de Escritorio, Limitada

Rank Xerox Noleggi SpA

Artificial Intelligence Limited

Badger Office Equipment

Channel Office Systems Limited

Coles Office Equipment Limited

Humber Business Products Limited

Kernal Technology Limited

Oakley Office Equipment Limited
(in liquidation)

Staffordshire Business Systems Limited

Sussex Office Services Limited

Text-Comm Limited

ACT Systemes S.A.

Alsatique

Ardennes Marne Bureatique

Axes Bureautiques Systemes

Axor Bureautique

Axis International

BSC Arve

Bureau Equip'Mans

Bureautique 64

Bureautique 66

Bureautique Distribution

Burobail S.A.

Burofinance S.A.

C2B Cazaban

C2R Bureautique

Centre Bureatique 49

Centre Bureatique Informatique

Competence Bureautique

Diffusion Bureautique de la Somme

Espace Bureautique

Franche Comte Bureautique

Informatique Bureautique Charente

Informel

L.A. Bureautique

Nimes Bureautique Communication

RSL Developpement SARL

Omicrome S.A.

Societe Industrielle Rank Xerox S.A.

Secob

Vaucluse Bureautique Service

Vienne Partenaire Bureautique

Selectronics, Inc.

The Genra Group, Inc.

Verbex Voice Systems, Inc.

Xerox Antilliana N.V.

Xerox de Bolivia Limitada

Xerox Canada Inc.

Teletech Financial Corporation

Xerox Canada Ltd.

Xerox de Colombia S.A.

Compucolsa S.A.

Xerox Dominicana, C. por A.

Xerox de El Salvador, S.A. de C.V.

Xerox Financial Services Life Insurance Company

Xerox d'Haiti, S.A.

Xerox de Honduras, S.A.

Avalanche Development Company

Xerox (Jamaica) Limited

Xerox de Panama, S.A.

Xerox del Peru, S.A.

Xerox Servicios Tecnicos, C.A.

Xerox Trinidad Limited

Xerox de Venezuela, C.A.

Xerox Zona Libre, S.A.

Xerox [Parent Corp.]

Supreme Court, U.S.
FILED
APR 2 1991
OFFICE OF THE CLERK

(2)

No. 90-1398

In The

Supreme Court of the United States

October Term, 1990

XEROX CORPORATION, A NEW YORK CORPORATION,
Petitioner,

vs.

PETER N. TOLLIVER, LEONE A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SEIBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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Daily Record Corporation
Rochester, New York

(17352)

QUESTIONS PRESENTED

1. Whether the central purposes of the Age Discrimination in Employment Act ("ADEA") administrative charge filing requirement with the Equal Employment Opportunity Commission (EEOC) have been met, as found by the Second Circuit Court of Appeals? That is, has there been sufficient notice to both the employer and the EEOC of the subject age discrimination complaints as well as an opportunity to investigate and conciliate these complaints?

2. Whether the decision of the Second Circuit Court of Appeals is consistent with the statutory interpretation of the EEOC, the Federal agency charged with its implementation, as well as consistent with other circuit courts of appeals which have decided issues similar to the present case?

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NATURE OF CASE

This is a brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, which Court in a written decision reversed and remanded to the United States District Court for the Western District of New York the 18 individual complaints of the named respondents herein who have pleaded actions against the petitioner alleging intentional and unlawful age discrimination in employment resulting in their termination as employees.

The United States Court of Appeals for the Second Circuit also denied petitioner's request for a rehearing of its decision and judgment and for a rehearing *en banc*. Accordingly, the present posture of this case, notwithstanding the instant petition for a Writ of Certiorari, is that the 18 named plaintiffs in their individual actions may proceed to be heard on the merits in the United States District Court for the Western District of New York on their complaints alleging unlawful age discrimination in employment against the defendant, Xerox Corporation.

Respondents herein respectfully request the denial of the petition for a Writ of Certiorari and that the matter be allowed to proceed on the merits in the trial court.

STATEMENT OF FACTS

The instant 18 named individual plaintiffs (respondents herein) allege certain facts in common. Among them are that they all were employed by the defendant Xerox Corporation and were wrongfully terminated from employment by reason of unlawful discrimination on the basis of age. All of the plaintiffs worked for Xerox in the Rochester, New York area. Each was terminated during an approximate two year period from November, 1981 to July, 1983. All of the plaintiffs were terminated from their employment with Xerox by reason of certain so-called "Re-

ductions in Force" ("RIFs"), some of which were alleged to be voluntary and others which were alleged to be involuntary. All of the plaintiffs fall within the protected class of workers between the ages of 40 through 70 years of age.

Additionally, all of the named plaintiffs herein affirmatively opted into the formerly conditionally certified class action which included some 1,312 former Xerox employees, when extant, which action was pending in the District Court of New Jersey alleging unlawful age discrimination in employment against Xerox. Said action was captioned *Lusardi v. Xerox Corporation*. Upon information and belief, certain aspects of that pending action which had been narrowed down to 13 named original plaintiffs may have been settled in a confidential settlement agreement, the terms of which are unknown to respondents. However, it has been reported that certain class action issues may remain unresolved. Nonetheless, following decertification of the aforesaid "Lusardi" class action, the 18 named plaintiffs herein who were not and are not parties to that settlement agreement and prior to any settlement which may have occurred, commenced their own individual actions in the United States District Court for the Western District of New York.

All of the named plaintiffs herein had alleged that they were members of the broadly defined class action grievance which had been extant in the "Lusardi" litigation, that is:

> "All salaried employees in the forty (40) - seventy (70) age group who in the period May 1, 1980 through March 31, 1983 have been terminated or required to retire from employment at an age less than seventy or have been denied equal employment opportunity for promotion in any unit, division or American subsidiary of Xerox Corporation and who contend that such termination, retirement or denial of promotion was caused by age discrimination policies or practices of Xerox Corporation.

See *Lusardi v. Xerox Corp.*, 747 F. 2d 174, 175 n. 1 (3d Cir. 1984) (A-5).*

As a result of various motions made by Xerox Corporation in the "Lusardi" litigation the class action was decertified. Included among the litigation involving the decertification issue was a mandamus proceeding captioned *Lusardi v. Leehner*, 855 F. 2d 1062 (3d Cir. 1988), which specifically held that the District Court's decertification determination should not consider as an issue pertinent thereto whether each opt-in plaintiff filed a timely charge with the EEOC. *Lusardi v. Lechner, supra*, at 1077-1080. Thus, the Third Circuit Court of Appeals specifically directed the District Court Judge to make its decision pertaining to the issue of class action certification or decertification without reliance on the timeliness of individual claimant's filings with the EEOC. The basis for said direction was that the original filing with the EEOC by the original "Lusardi" claimants had been timely, proper, and sufficiently stated a class action complaint such as to put Xerox and the EEOC on notice of the broad nature of the age discrimination grievance.

Following decertification of the class action in "Lusardi," these 18 former opt-in plaintiffs commenced their own timely individual complaints in the United States District Court for the Western District of New York. Following service of the instant actions upon Xerox, the defendants moved in the District Court for the Western District of New York for summary judgment and dismissal of these 18 individual complaints, *et uno*. The defendant (petitioner herein) sought dismissal on the grounds that these individual plaintiffs had not timely filed individual grievances with the EEOC so as to permit them to commence their respective actions alleging age discrimination in employment. This argu-

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*References to appendix pages are to appendix of petitioner's application for a Writ of Certiorari.

ment was made by petitioner notwithstanding that these plaintiffs were alleging that the acts of individual age discrimination which were being complained of by each of these plaintiffs were the same identical acts of discrimination previously alleged in the class action, occurred during the same alleged period of time and were as a result of the same alleged policies and practices which these same individuals had previously been complaining of in the then extant "Lusardi" class action. The District Court for the Western District of New York agreed with Xerox Corporation and dismissed all of these individual complaints principally on the grounds that the individual plaintiffs involved herein did not timely file an individual administrative charge with the EEOC following their termination from employment from Xerox Corporation. The District Court held that the individual plaintiffs herein could not "piggyback" on the previously filed class action age discrimination administrative charge filed by the original "Lusardi" plaintiffs for purposes of meeting the charge filing requirements of the Age Discrimination in Employment Act Section 7(d), 29 U.S.C. Section 626 (d) (2) (1988) ("ADEA"). The District Court thus dismissed each of the 18 individual actions presently involved in this proceeding.

All of the individual plaintiffs involved herein appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit Court of Appeals consolidated the 18 individual appeals for procedural purposes and reversed the District Court's decision and findings relative to the age discrimination issues. The Court found that the District Court erred in dismissing these complaints alleging age discrimination and remanded the matters back to the trial court for further proceedings on the merits.

The Second Circuit Court of Appeals essentially agreed with the individual plaintiffs herein and the position of the EEOC, which had filed an Amicus Curiae brief in support of the individual plaintiffs and participated in the oral argument on the ap-

peal. The EEOC's interpretation of the ADEA charge filing requirements does not require that each individual must file his own charge with the EEOC before he can bring an ADEA action, but only that *"a charge* alleging unlawful discrimination has been filed." 29 U.S.C. Section 626 (d) (1988) (A-67) (emphasis added). See also, opinion of Second Circuit reprinted at page A-8 with emphasis in original opinion. The Second Circuit Court of Appeals, the EEOC, and the 18 individual named plaintiffs herein, and the American Association of Retired Persons ("AARP"), who also filed an *Amicus Curiae* brief in support of these respondents in the Second Circuit Court of Appeals, *inter alia*, agreed that the administrative charge filing requirement of the law was met in this case and that it was improvident and incorrect to dismiss these complaints. It is submitted that the ruling and analysis of the Second Circuit Court of Appeals is correct and that a Writ of Certiorari is unwarranted in the present circumstances.

REASONS FOR NOT GRANTING THE WRIT

POINT I

THE CENTRAL PURPOSE OF THE CHARGE FILING REQUIREMENT WITH THE EEOC HAS BEEN MET, I.E. THERE HAS BEEN SUFFICIENT NOTICE TO BOTH THE EMPLOYER AND THE EEOC OF THE CLASS-WIDE AGE DISCRIMINATION COMPLAINTS AS WELL AS AN OPPORTUNITY TO INVESTIGATE AND CONCILIATE THE COMPLAINTS WHICH WERE MADE.

It appears from a reading of the petitioner's arguments under its first point in the underlying petition seeking a Writ of Certiorari that petitioner agrees with the central purposes of the ADEA administrative charge filing requirements with the EEOC. That

is, to put the EEOC and the employer on notice of the complaint, to permit an investigation thereof, and to attempt conciliation and voluntary compliance alleviating the necessity of resort to litigation to resolve the dispute. 29 U.S.C. Section 626 (d) (1988). There can be no doubt that this is consistent with the law, the opinion of the Second Circuit and the interpretation of the EEOC. See opinion of Second Circuit below, wherein it is stated,

> The question is whether the timely filed claims provided an adequate opportunity to satisfy the statutory tasks imposed upon the EEOC. Central to those tasks is an attempt to conciliate the grievances. (A-14).

Where the instant plaintiffs differ with petitioner and where petitioner differs with the law as applied and interpreted by the EEOC and as determined by the Second Circuit is with petitioner's argument that the instant class action wide administrative charge which *was* filed in this case by the original "Lusardi" plaintiffs was insufficient to put Xerox on notice of the nature of the complaint and/or deprived Xerox of an opportunity to resolve the grievance through the informal means of conciliation, conference and persuasion. (emphasis added).

As recognized by the Second Circuit when the "Lusardi" named plaintiffs filed their charges, both the EEOC and Xerox were aware of the charges of unlawful age discrimination being brought by former employees concerning Xerox's "RIFs" during the years 1981 through 1983, as implemented by Xerox involving persons aged 40 to 70. The original administrative charge filed by the "Lusardi" plaintiffs did not purport to complain of a single isolated act of alleged age discrimination. Rather, it was a broad based charge of age discrimination covering a period of approximately two years and involving a group of former employees over the age of forty (40) expressly alleging an unlawful pattern of discrimination by Xerox against persons as a class, particu-

larly with respect to the implementation of reductions in the work force.

There can be no doubt that such a charge put Xerox on notice that they were dealing with more than an isolated act of discrimination by a single individual. Xerox chose to respond to the class action age discrimination grievance filed in the EEOC by denying its validity and forcing litigation. Conciliation efforts in the EEOC failed. Xerox should not now be heard to argue that the law requires individual filings by each and every potential plaintiff who was in that putative class for at least two reasons: (1) Xerox had specific notice of who these individuals were, by name, by reason of the opt-in requirement of 29 U.S.C. Section 216 (b) (1988) (A-69, A-70) and did not avail themselves of the opportunity to conciliate the grievances with these individuals either when the class action administrative filing was initially made in the EEOC, nor (2) did Xerox avail itself of the opportunity to conciliate with them when the class action litigation was still extant and the exact number and names of such persons were known to Xerox.

Xerox's refusal to enter into proper conciliation agreements with these named plaintiffs as well as Xerox's refusal to litigate their claims on the merits demonstrates that the strategy of Xerox is to delay, stall, confuse and procedurally obfuscate legitimate claims in an attempt to simply wear down enough people to reduce their potential liability. Such a tact has nothing to do with the congressional purposes which support the Age Discrimination in Employment Act.

The arguments which Xerox is making in this proceeding have no merit. They are contradictory with Xerox's own positions in prior litigation concerning these identical plaintiffs. In addition, they fly in the face of established law in similar Title VII actions in other circuit court opinions in this and in other contexts. Petitioner's arguments are also contrary to the sound administrative

policy and interpretation of the Federal agency charged with the duty to implement congressional intent in this area, i.e., the Equal Employment Opportunity Commission ("EEOC").

Xerox's arguments have been rejected by the circuit courts in the context of Title VII claims and as has been pointed out by Judge (later Attorney General) Griffin Bell in *Oatis v. Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968):

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume that the next one would be successful.

See also, *Bowe v. Colgate Palmolive Co.*, 426 F. 2d 711, 719-721 (7th Cir. 1969).

It is submitted that petitioner advances no substantial public policy reason or practical concern for requiring multiple, virtually identical charges by each and every individual plaintiff in this case. As the employer, Xerox had knowledge of the class wide nature of the complaint in a timely fashion both in the EEOC and in the prior class action litigation. In fact, as a result of the affirmative opt-in requirements of the law (29 U.S.C. Section 216 (b) (1988)), Xerox had knowledge of the names and circumstances of each and every named plaintiff involved herein while the class action litigation was still extant. In several cases this knowledge of Xerox has been in their possession for in excess of seven (7) years. (Braun's opt-in occurred in March 1984, for example). Thus these claims were not stale when made. It is respectfully submitted that the only thing that is getting stale is the refusal of Xerox to face the reality of its own protracted litigation tactics and to do what it should have done many years ago, that is to resolve fairly and peaceably these justified grievances of its former employees.

Accordingly, it is submitted that the central purposes of the ADEA charge filing requirements of notice and opportunity to conciliate have been met by the statutory interpretation espoused by the EEOC and adopted by the Second Circuit Court of Appeals. Thus, the petition for a Writ of Certiorari sought herein should be denied.

POINT II

THE DECISION OF THE SECOND CIRCUIT DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS AND IN FACT REDUCES UNNECESSARY PROLIFERATION OF LITIGATION.

It should be pointed out to this Court that the contention of petitioner, Xerox Corp., that the decision of the Second Circuit creates an "apparent conflict among the circuits" is without merit. It is important for this Court to realize that the determination which was made by the Second Circuit in this case was, in reality, a determination of an issue of first impression. To the knowledge of the plaintiffs, *amici*, and the Circuit Court, no prior case has been found which concerns the principal issue which the Second Circuit was confronted with. That is, whether a prior proper and timely filing of an EEOC age discrimination charge alleging class wide age discrimination in employment is sufficient to permit former class action opt-in plaintiffs who had previously been a part of the class action litigation, when certified, to commence their own individual actions in court, after decertification, without the necessity of re-filing or filing new administrative charges for each former opt-in plaintiff who seeks redress in his own individual action as long as the original charge was timely as to him.

That such an issue is one of first impression is basically conceded by petitioner itself at page 57 of its Petition herein, wherein

it is stated, "...the Second Circuit is the first circuit court which has specifically addressed this issue...."

Petitioner would argue that notwithstanding that this is an issue of first impression it is nevertheless in conflict with other circuits because other circuits dealing with single filing rules under the ADEA have previously only been concerned with their effect on opt-in plaintiffs in ongoing class action litigation. None, however, have been concerned with the circumstances of this case, i.e., involving a decertified class action and former opt-in plaintiffs seeking to commence their own individual actions following decertification of the class action. Cf. *Lockhart v. Westinghouse Credit Corp.*, 879 F. 2d 43 (3rd Cir. 1989); *Anderson v. Montgomery Ward & Co., Inc.*, 852 F. 2d 1008 (7th Cir. 1988); *Kloos v. Carter-Day Co.*, 799 F. 2d 397 (8th Cir. 1986); *Mistretta v. Sandia Corp.*, 639 F. 2d 588 (10th Cir. 1980); *Bean v. Crocker Nat'l Bank*, 600 F. 2d 754 (9th Cir. 1979); *Oatis v. Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968).

Not only have the other circuits, in contra-distinction to the point petitioner is contending, upheld the single filing rules in the context of piggybacking into ongoing class actions, but as pointed out by the Second Circuit herein have permitted such single filing rules to allow aggrieved plaintiffs to join in individual's lawsuits who have filed timely administrative charges provided the claims " 'aris[e] out of similar discriminatory treatment in the same time frame.' " *Snell v. Suffolk County*, 782 F. 2d 1094, 1100 (2d Cir. 1986) (quoting *Ezell v. Mobil Housing Board*, 709 F. 2d 1376, 1381 (11th Cir. 1983) (and citing *De Medina v. Reinhardt*, 686 F. 2d 997, 1012-13 (D.C. Cir. 1982); *Crawford v. United States Steel Corp.*, 660 F. 2d 663, 665-66 (5th Cir. 1981); *Allen v. Amalgamated Transit Union Local 788*, 554 F. 2d 876, 882-83 (8th Cir.), cert. denied, 434 U.S. 891 (1977) (A-8, A-9).

Thus, the Second Circuit's analysis and application of the single filing rule to the instant plaintiffs is not only consistent with

the analysis and application of the rule in the circumstances which have pre-dated it, but is also consistent with the analysis and application of the rule in Title VII actions where it has been similarly applied. See e.g. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982).

With regard to the contention of petitioner that the Second Circuit's application of the single filing rule will result in a proliferation of unnecessary litigation, it is submitted that the contention is without merit and in fact that the exact opposite is true. The use of a single filing rule will on its face in an appropriate case such as the present one, reduce the number of administrative filings with the EEOC by potentially thousands of unnecessary filings. This is not only common sense, but it is also the interpretation of the EEOC itself which, as found by the Second Circuit, is entitled to the same deference accorded to its interpretation of analogous Title VII provisions. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979). (A-10). The EEOC has interpreted the ADEA filing requirements to be satisfied "so long as the matter complained of was within the scope of [a] previously filed charge, *regardless of who filed it.*" (emphasis added). 43 Fed. Reg. 138, 139 (1983) (A-10).

No purpose can be served by requiring individual plaintiffs whose name and complaint are already known to the employer by reason of their formerly having filed an opt-in document in a previously pending conditionally certified class action to have to file another complaint with the EEOC in order to commence their own individual action in court following decertification. To require such, as Xerox would want, would obviously require the proliferation of unnecessary and repetitive filings where none such is warranted. Such an argument has been rejected by the EEOC as an unnecessary burden upon them and has been rejected by the Courts in Title VII situations. See e.g. *Oatis v.*

Crown Zellerbach Corp., supra, 398 F. 2d 496, at 498 (5th Cir. 1968). It has now also properly been rejected by the Second Circuit in the context of this case, under the ADEA (A-10).

One final point should be noted in this context. That is, that petitioner's arguments suggesting (1) a conflict among circuits where none exists, and (2) a proliferation of litigation where, in reality, only a reduction in litigation would occur, suggests the disingenuity of petitioner's position throughout this litigation. It must be remembered that it is as a result of petitioner's motion that the class action litigation in *Lusardi v. Xerox Corporation, supra*, was decertified. Petitioner could have chosen to defend that action on the merits or to conciliate it while it was in the class wide posture. However, petitioner chose to defend their action by seeking decertification of the class which it achieved.

At page 61 of the petition, Xerox argues that the claims of non-filing plaintiffs "should only be litigated, if at all, together." It is totally inconsistent that Xerox can be heard to make this argument because the reason these individual plaintiffs are before this court at all in their individual capacities, is because their attempt to litigate their claims against Xerox "together," that is, in an opt-in class action, was defeated by Xerox in its motion for decertification of the class. Xerox seeks to ignore the posture of its prior motions that these plaintiffs were not sufficiently "similarly situated" to maintain a class action and now attempts to argue at page 61 that they "are similarly situated but have not filed timely charges." It is respectfully submitted that Xerox should not be permitted to have it both ways.

There is no question that while these individual plaintiffs were members of the putative class action that the single administrative filing in *Lusardi, supra* was sufficient. See e.g. *Lusardi v. Lechner, supra; Kloos v. Carter-Day Co., supra; Anderson v. Montgomery Ward & Co., supra et al.* Thus, the result of petitioner's own strategy, not the law, nor the Second Circuit's opin-

ion, has occasioned these additional individual lawsuits. Now for petitioner to suggest that a single filing rule will result in a proliferation of litigation is to try to blind the Court to the reality of the circumstances. That is, that the present litigation results from the discrimination practices and policies of the petitioner together with the litigation strategy it has adopted and not from the opinion of the Second Circuit, the interpretation of the EEOC, nor the actions of these individual plaintiffs. Plaintiffs are seeking to resolve these complaints expeditiously and on the merits rather than piecemeal and through the process of petitioner's arcane and procedurally obfuscating tactics.

Since the single filing rule adequately apprised Xerox and the EEOC of both the nature and breadth of the age discrimination complaints as well as provided Xerox with an adequate opportunity to conciliate the class action claims when extant had they availed themselves of it, such a rule must surely be considered to be adequate following decertification of the class after Xerox already has had an opportunity to conduct extensive discovery of known plaintiffs. In fact, this is information which it would not have had the class action administrative charge not been made and these individual plaintiffs not previously affirmatively opted into the "Lusardi" class action many years ago. There is clearly no prejudice to Xerox by the adoption of the single filing rule which is the subject of this petition for a Writ of Certiorari in the circumstances of this case. It is submitted that common sense, the practical interpretation advanced by the EEOC, as well as the sound public policy reasons adopted by the Second Circuit Court of Appeals dictate that the result reached in the court below was correct.

Accordingly, it is submitted that there is no merit to the petition for a Writ of Certiorari and petitioner's application should be denied.

The arguments of the Equal Employment Advisory Council ("EEAC") in their proposed *Amicus Curiae* Brief and motion relative to the petition for Writ of Certiorari are also misplaced.

The "single-filing rule" of the Second Circuit Court of Appeals clearly took into consideration the fact that timely class action administrative charges were filed with the EEOC by the "Lusardi" plaintiffs in this case. It cannot be over-emphasized to this court that contrary to the position of the petitioner and the EEAC, these individual plaintiffs all timely opted into the then extant and conditionally certified class action. Thus, for two important reasons, EEAC's and petitioner's arguments are misplaced, as follows: 1) the initial class action administrative charge of the "Lusardi" plaintiffs gave notice to the employer and to the EEOC that more than one isolated act of employment discrimination by reason of age was alleged. The initial charge alleged broad based, class wide, age discrimination covering a period of approximately two years and involving more than one department or division of Xerox. Thus, had Xerox chosen to conciliate this charge, rather than defend on the basis that no such discrimination occurred, it could have done so on a class basis based upon the notice it received from the "Lusardi" administrative charge; and 2) the 18 individual plaintiffs herein were all part of the "Lusardi" class action litigation having affirmatively opted into that conditionally certified class action in a timely and proper manner. Thus, had Xerox chosen to conciliate with these persons on an individual basis, also in keeping with the central purposes of the ADEA charge filing statutory requirements it could have done so when the class action was still extant and in some cases more than seven (7) years ago. Thùs, neither Xerox nor the EEAC should be heard to argue that these claims are stale. They were not stale when filed by "Lusardi" on a class action basis and were not stale when individually opted into by these plaintiffs in the "Lusardi" litigation. EEAC's strawman arguments that an individual could wait fifteen (15) or twenty (20)

years to file an age discrimination claim after "a timely charge was filed, even if the charge was not filed in connection with these ADEA actions," (EEAC *Amicus* Brief, at page 13) ignores the reasoning and analysis of the Second Circuit, the clear requirements of notice having been met in the context of this case, and the statutes of limitation, where applicable, which would prevent truly stale claims from being asserted in this context. These claims are not stale and were not stale when made. The Second Circuit's opinion and reasoning should be allowed to stand and the petition for a Writ of Certiorari denied.

CONCLUSION

The petition seeking a Writ of Certiorari should be denied.

Dated: April 5, 1991

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No. 90-1398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

XEROX CORPORATION, a New York Corporation,
Petitioner,
v.

PETER N. TOLLIVER, LEON A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SIEBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the Xerox Corpora-

tion's petition for a writ of certiorari. Respondents Tolliver, *et al.*, have refused consent. In support of this motion, EEAC by the following shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 230 major U.S. companies, as well as several associations which themselves have hundreds of corporate members. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. As employers, EEAC's members are subject to various equal employment laws, including the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, the statute at issue herein. Many EEAC members currently face difficult financial times, and have implemented or are considering the use of voluntary or involuntary separation programs. Inevitably, some separated employees will choose initially not to file suit challenging the separation, but, after seeing fellow employees pursuing claims of discrimination, may later decide to "piggyback" untimely claims onto the timely-filed charges of co-workers, or, if the Second Circuit's unprecedented decision is allowed to stand, maintain their *own individual actions* long after the ADEA's filing period has expired. Under such a rule, plaintiffs will be able to file individual lawsuits even if they have not filed timely

charges with the Equal Employment Opportunity Commission (EEOC), as long as their suits are based on "a" single timely filing, even if that filing took place several years before the plaintiffs' lawsuits. Under such an ill-founded rule, employers would never know the full number of plaintiffs, and would have to treat every case as a potential class action.

3. Because of its interest in the application of the nation's equal employment laws, EEAC has filed amicus briefs in many cases before this Court, including a number involving the proper interpretation of the ADEA. *See, e.g., Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989); *McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677 (1988); *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985); and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In addition to filing a brief in support of Xerox's petition for reconsideration in the Second Circuit below, EEAC also has filed briefs with other Courts of Appeals on the issue of piggybacking under the ADEA in *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008 (7th Cir. 1988), and *Gray v. Phillips Petroleum Co.*, 858 F.2d 610 (10th Cir. 1988) (issue not reached by court). Thus, EEAC has an interest in, and a familiarity with, the concerns presented in Xerox's petition herein.

4. Because of its significant experience, EEAC is uniquely situated to brief this Court on issues beyond those of concern to the immediate parties. Indeed, EEAC's brief presents the relevant concerns of the business community and demonstrates the significance of this case generally. Accordingly, the brief brings relevant matters to the attention of the Court that will not be brought to the Court's attention by the parties.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1398

XEROX CORPORATION, a New York Corporation,
Petitioner,

v.

PETER N. TOLLIVER, LEON A. WIATER, HELEN A. FORDHAM, DONALD SCHAEFER, WALTER L. PIDEK, JAMES CARROLL, LAWRENCE L. TRAVIS, WILLIAM BRANT, JAMES DAMMEN, CHARLES DOLCIMASCOLO, JOHN L. BENNETT, JOSEPH G. GOLOSSI, HAROLD SIEBERT, ALFRED E. RIZZARI, ALFONSE OLIVERI, PAUL J. MITTAK, RICHARD B. VAN MAAREN, and PAUL F. BRAUN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The brief supports the petition for a writ of certiorari filed in this case by Xerox, and urges reversal of the decision below.

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[1] A letter of consent on behalf of Petitioner Xerox Corporation has been filed with the Clerk of the Court. Respondents have refused consent.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Because of increased competition and financial challenges, Xerox was required to decrease the size of its workforce through voluntary and involuntary reduction programs. The 18 plaintiffs herein all separated from Xerox between November 1, 1981, and July 11, 1983, months or years before contending that they had been unlawfully terminated in violation of the ADEA.

In early 1982, four former Xerox employees (who are not parties to the instant lawsuit) filed charges with the Equal Employment Opportunity Commission (EEOC) within the requisite 300 days of their separation from the company. Based on those charges, the four subsequently filed a lawsuit entitled *Lusardi v. Xerox Corp.* In 1983, the four timely-filed plaintiffs sought certification of the suit as a class action. In 1984, the district court judge conditionally certified the suit as an "opt in" class—a procedure unique to the ADEA that requires would-be class members to file written consents in order to become part of the class.[2] Three years later, however, District Judge Lechner decertified the class. 118 F.R.D. 351.

The plaintiffs herein never attempted to "opt into" the *Lusardi* case within 300 days of their separation from the company. A. 417.[3] Nor did any of them file a charge with the agency within 300 days of their separation. As noted by the district court below, "the dates of filing range from 392 days after the alleged discriminatory act

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[2] The "opt-in" provision is explained fully in Argument IB. below.

[3] Plaintiff Oliveri did attempt to opt into the *Lusardi* action within 300 days of his separation, but he did not fit within the definition of the *Lusardi* class.

(plaintiff Bennett) to 2,655 days thereafter (plaintiff Schaefer)." A. 407.[4] Nine others filed over 2,000 days after their leaving the company, and four have never filed a claim. A. 406-407.

The Third Circuit issued a writ of mandamus directing Judge Lechner to reexamine his decertification. 855 F.2d 1062. On remand, he reaffirmed that there was no discriminatory action common to all class members. 122 F.R.D. 463.

The 18 plaintiffs herein then filed individual ADEA lawsuits. But because of their failure to file claims within 300 days of their discharge, District Judge Larimer granted Xerox's motion to dismiss. Judge Larimer refused to permit the 18 plaintiffs to "piggyback" onto the timely-filed claims, noting that "it would be erroneous, especially on the facts of this case, to ignore Congress' well-expressed intention to bar suits brought on the basis of accusations of discriminatory motive which are leveled years after the adverse employment decision has been made." A. 412-413.

The Second Circuit reversed and remanded, greatly extending the concept of piggybacking beyond that recognized in any other circuit by concluding 1) that the so-called "single-filing rule" is available to ADEA plaintiffs just as it is to plaintiffs suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; 2) that the single-filing rule may be used, not only by those joining an *existing* suit, but also by those initiating individual suits; and 3) that the administrative claims filed by the *Lusardi* plaintiffs were sufficient to secure the benefit of the single-filing rule for the 18 plaintiffs even if they were not similarly situated to the *Lusardi* plaintiffs, and even though the court did not have the com-

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[4] References to the Joint Appendix are referred to as "A" followed by the relevant page number(s).

plete *Lusardi* charge before it. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-1060 (2d Cir. 1990).

The Second Circuit stressed that its holding was not limited to the facts of the instant case, which involved the ability of decertified members of the *Lusardi* class to file separate lawsuits. The court stated that the real issue was whether the plaintiffs here can benefit from the timely charge filed by the *Lusardi* plaintiffs "irrespective of the class action that those plaintiffs endeavored to maintain." 918 F.2d 1052, 1056-1057. The Court then held that the single filing rule "may be used to permit an ADEA plaintiff to file his or her own lawsuit, rather than to join in a previously filed suit, either as co-plaintiff or intervenor." *Id.* at 1057. Accordingly, under the Second Circuit's holding, there is "no reason to require ADEA plaintiffs seeking to benefit from the single filing rule to join preexisting individual suits." *Id.* Thus, as long as the charging party defines its charge "broadly enough to include those who seek to piggyback on the claim", the Second Circuit will deem the charge sufficient to allow piggybacking even if the claimant does not purport to represent a class or others similarly situated. *Id.* at 1058.

The Second Circuit then denied Xerox's petition for rehearing and suggestion for rehearing in banc, and granted the company's motion for stay of mandate pending application to this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Court should grant Xerox's petition for a writ of certiorari to overturn the Second Circuit's ill-conceived decision, which has broad implications beyond the facts of the instant case. That decision permits plaintiffs to bring individual ADEA lawsuits pursuant to the so-called "single-filing" rule in instances where they have not filed timely charges with the EEOC—indeed, even where the untimely suits are based on a single timely filing of a person not a party to the actions and where the

charging party is not even similarly situated to those attempting to piggyback on the charge. The Second Circuit's ruling improperly conflicts with the plain language of the ADEA, extends and conflicts with court interpretations in other circuits, and runs afoul of the policy buttressing the law.

Before commencing an action in the federal courts, the plain language of ADEA Section 626(d) requires a plaintiff to have filed a charge with the EEOC within 300 days of the alleged unlawful practice. Indeed, because the language in Section 626 is phrased as "shall be filed," the 300-day requirement operates, according to the district court below, as a "statute of limitations," A. 411-412, and is a "prerequisite to all actions under [the] ADEA." *Foster v. CBS Records, Inc.*, 109 F.R.D. 168, 169 (S.D.N.Y. 1986). These 18 plaintiffs failed to file charges of discrimination within this requisite period —indeed some have not filed charges at all—and are thus time-barred.

Some courts have adopted an exception to this strict filing requirement to further the purposes of ADEA Section 216(b). That section provides for an "opt-in" class action, whereby persons may join a suit by affirmatively consenting in writing. But these 18 are precluded from utilizing the so-called "piggybacking" exception because the *Lusardi* class was decertified and their opt-in status was lost.

The Second Circuit's decision, however, goes far beyond construing the piggyback exception developed under Section 216(b) to cover these plaintiffs. Indeed, the Second Circuit's decision adopts and extends what it calls the "single-filing rule" allegedly contained in 29 U.S.C. § 626(d). Under the Second Circuit rule, persons who have not filed timely charges, and who are not "similarly situated" to those who have, can still proceed with their own lawsuits. Unless accepted for review and overturned, the decision will pull this single-filing rule from its statu-

tory tethers by allowing "an ADEA plaintiff to *file his or her own lawsuit*, rather than to join in a previously filed suit." For example, here the court permitted the *Lusardi* charge to "suffice to secure the benefit of the 'single filing rule' for the 18 appellants" even though the Second Circuit never had the *Lusardi* charge before it, and even though the 18 plaintiffs here are not similarly situated to those in the *Lusardi* case. 918 F.2d at 1057 (emphasis added). And as the Second Circuit made clear, this result could occur even if a plaintiff in a lawsuit never attempted to intervene or join in a preexisting suit, or even if the timely charge was never part of an earlier action. Such a rule conflicts with the ADEA and improperly departs from the rules adopted in every other court of appeals.

In addition to resolving the split in the circuits, this Court should accept this case for review for a number of practical and policy reasons. The business community, which EEAC represents, is concerned that the Second Circuit's rule will actually destroy the viability of the EEOC's conciliation process, whereby employers, after being notified of the full extent of alleged discriminatory practices, are given a chance to rectify voluntarily alleged violations, thereby avoiding court action. Under the single-filing rule adopted by the court below, an employer would have to wait to determine if a single claim could mushroom into limitless other claims, and would have to wait indefinitely to know the potential magnitude of its liability.

Thus, the decision below has important implications extending beyond the unique circumstances of this particular case. It effectively requires employers to "treat all individual charges as potential class actions," *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986), and thereby "labor under the threat of a covert class action throughout the judicial proceedings," *id.* at 400-01. If

left standing, its unintended but inevitable result will be to remove much of the incentive for employers to use conciliation. This Court should not sanction such a result.

Rejection of the single filing rule also is necessary to ensure that employers are given formal notice of the charges against them, allowing them to conduct an appropriate defense. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). In conducting an appropriate defense, an employer needs to be apprised of the scope of a charge in order to preserve records and secure witnesses. And, as the Fifth Circuit noted in *Edwards v. Kaiser Aluminum and Chemical Sales*, 515 F.2d 1195, 1199 (5th Cir. 1975), timely filing promotes "informal good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources." Indeed, another compelling reason for this Court to accept this case is to "limit[] the chances for the filing of suits based on [a plaintiff's] subsequent motivations or reassessments." *Kloos*, 799 F.2d at 400. This timely filing requirement "is of *particular* significance in the age discrimination area, where every employed person over the age of forty is a potential plaintiff." *Id.* (emphasis added).

Accordingly, this Court should accept the case for review with an eye toward rejecting the single-filing rule adopted by the Second Circuit below.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S RULE—PERMITTING PLAINTIFFS TO PURSUE INDIVIDUAL CLAIMS OF DISCRIMINATION UNDER THE SO-CALLED "SINGLE-FILING" RULE EVEN THOUGH THEY HAVE FAILED TO FILE TIMELY EEOC CHARGES OR PROPERLY OPT INTO AN ACTION BROUGHT BY PLAINTIFFS WHO FILED TIMELY CHARGES —CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADEA AND IMPROPERLY DEPARTS FROM THE RULES ADOPTED BY COURTS IN OTHER CIRCUITS

EEAC supports Xerox's petition for writ of certiorari because the Second Circuit has rendered a decision in conflict with decisions in other courts of appeals, and has so far departed from the existing "piggybacking" exception as to read the charge filing requirement out of the Act, calling for an exercise of this Court's power of supervision. Supreme Court Rule 10. Indeed, the Second Circuit stressed that its decision was not limited to the facts of this case, and stressed that "piggybacking" could be used by plaintiffs who were not similarly situated to the individual filing a timely charge, and where they never attempted to join or intervene in the initial suit. Unless accepted for review and overturned, the Second Circuit's ruling will result in unfair consequences unintended by the ADEA's Congressional drafters, and will lead to a severe negative effect on the way parties use conciliation and the way companies defend allegations of age discrimination.

A. Because No Plaintiff Filed A Timely Charge, The Second Circuit's Single-Filing Rule Conflicts With The Plain Language Of The ADEA's Filing Requirements

Section 626(d) of the ADEA requires a plaintiff to file a timely charge of discrimination with the EEOC before commencing an action in the federal courts. 29

U.S.C. § 626(d).[5] For purposes of this lawsuit, this "timely charge" period is "within 300 days after the alleged unlawful practice occurred," 29 U.S.C. § 626 (d) (2). Since the alleged unlawful practices occurred when the 18 plaintiffs separated from Xerox—between November 1, 1981 and July 11, 1983—all 18 had to file charges by mid-1984 at the latest, in order to preserve their rights. They did not. A. 406.

The statutory language requiring this timely filing is unequivocal. Section 626(d) uses the word "shall"—not "may" or "can." It states, "*No* civil action may be commenced . . . until . . . after a charge . . . has been filed . . . . Such a charge *shall* be filed . . . within 300 days after the alleged unlawful practice occurred . . .." *Id.* (emphasis added). As properly noted by the district court below, "the 300-day EEOC filing requirement operates as a statute of limitations, compliance with which is mandatory and rigorously enforced." A. 411-412. *Foster v. CBS Records, Inc.*, 109 F.R.D. 168, 169 (S.D.N.Y. 1986) (the timely filing is a "prerequisite to all actions under [the] ADEA"). Accordingly, since none of the plaintiffs herein complied with the filing requirement,

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[5] 29 U.S.C. § 626(d) states:

> *No civil action may be commenced* by an individual under this section *until* 60 days *after a charge* alleging unlawful discrimination *has been filed* with the Equal Employment Opportunity Commission. *Such a charge shall be filed*—
>
> * * * * *
>
> (2) in a case to which section 633(b) of this title applies, *within 300 days after the alleged unlawful practice occurred*, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, *the Commission shall* promptly notify all persons named in such charge as prospective defendants in the action and shall *promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.* (Emphasis added).

they are time-barred, and any rule to the contrary conflicts with the plain language of the statute.

B. No Plaintiffs May Piggyback Herein, And The Single-Filing Rule Should Not Be Used To Obviate The ADEA's Clear Statutory Language

Some courts have found an exception to this timely filing rule, the so-called "piggyback" exception. These courts have held that such an exception is necessary to further the purpose of 29 U.S.C. § 216(b), which allows persons to join a suit brought by one or more other persons "similarly situated" to themselves.[6] Under this provision . . . all plaintiffs in an ADEA representative action must affirmatively opt-in to the suit." *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988). As an "opt in" form of class action, it is thus distinct from the Fed. R. Civ. P. 23 "opt-out" class action used in Title VII litigation.

All 18 plaintiffs in this case opted into the *Lusardi* action, but the class initially containing these plaintiffs was decertified and their "opt in" status was lost. *Lusardi*, 118 F.R.D. 351, *reaffirmed*, 122 F.R.D. 463. Accordingly, none can avail himself of the so-called piggyback exception developed in connection with Section 216(b).[7]

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[6] 29 U.S.C. § 626(b) of the ADEA states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*]." Section 216(b) provides as follows:

> [*A*]*ction* to recover [such] liability . . . *may be maintained* . . . in any . . . court of competent jurisdiction *by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.* No employees shall be a party plaintiff to any such action unless he gives his *consent in writing* to become such a party and such consent is *filed* in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

[7] *See Kloos v. Carter-Day Co.*, 799 F.2d 397, 399 (8th Cir. 1986) (ADEA administrative filings may not serve as the basis for juris-

The Second Circuit's decision herein, however, goes far beyond construing the so-called piggyback exception to cover these plaintiffs. Indeed, the decision adopts and radically extends a "single-filing rule" allegedly contained in 29 U.S.C. § 626(d). As a result, persons who have not filed timely charges, and who are not "similarly situated" to those who have, can still proceed with a lawsuit. According to the decision, because the ADEA's administrative procedure is "modeled" on Title VII's procedure, and because the "single-filing rule" has been used in Title VII class actions, it is "equally appropriate to apply [the rule] to ADEA individual actions by analogy to its application to Title VII individual actions." 918 F.2d at 1057.

In fact, however, the decision goes far beyond any existing Title VII ruling. Unless accepted for review and overturned, the decision will pull this "single-filing rule" from its statutory tethers by allowing "an ADEA plaintiff to *file his or her own lawsuit*, rather than to join in a previously filed suit," and indeed will permit the *Lusardi* charge to "suffice to secure the benefit of the 'single filing rule' for the 18 appellants" even though the district court below never had the *Lusardi* charge before it, and even though the 18 plaintiffs here are not similarly situated to those in the *Lusardi* case. *Id.* (emphasis added).

The exception recognized by some courts to further the purposes of Section 216(b) cannot be so broad that it swallows the express language of Section 626(d). Section 626(d) states clearly that a charge must be filed with the EEOC within 300 days of the occurrence of the unlawful practice. The cases which have allowed an

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diction over opt-in class plaintiffs who never filed administrative charges); *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 755 (5th Cir. 1980); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 610-11 (5th Cir. 1977) (Section 216(b) "opt-in" procedure must be used).

ADEA plaintiff who has not filed a timely charge to piggyback onto the timely-filed charges of another, require that a plaintiff has "opted in" pursuant to Section 216(b).[8] In addition, just because Title VII permits "single-filing" does not mean the same procedure is (or should be) permitted under the ADEA.

The amicus American Association of Retired Persons (AARP) argued below that the district court "mistakenly links" Section 216(b) with Section 626(d).[9] AARP Brief to Second Circuit at 8. AARP claimed that "[t]he one, *and only*, touchstone for an adequate charge is the sufficiency of notice to the EEOC so it can conciliate the charge." *Id.* at 9. But to ignore the plain language of Section 626(d) and expand the so-called piggyback exception by adopting the Second Circuit's "single filing" rule would read Section 626(d) right out of the statute and make it impossible for any meaningful conciliation to occur.

The EEOC, as amicus, conceded below that "Title VII's single filing rule has always been applied in situations where at least one plaintiff in the action in question had filed a timely charge." EEOC Brief to Second Circuit at 12. Yet the EEOC would extend Title VII's single-filing rule into this ADEA action, even though none of the 18

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[8] In 1978, Congress amended Section 626(d) to allow the filing of a "charge" rather than a notice of intent to sue, a change used by the Second Circuit below to support its incorporation of Title VII's single filing rule into the ADEA. 918 F.2d 1052, 1056. But, as explained fully in Xerox's brief to the Second Circuit below, the "change in language is not intended to alter the basic purpose of the notice requirement"—notice to the defendant and an opportunity to conciliate. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978). See Xerox Brief at 27. Neither purpose was achieved by the Second Circuit's ruling.

[9] Indeed, the Fifth Circuit in *McCorstin* noted that the "district court was correct" when it "held that § 626(d) notice was a prerequisite to and complement of the class action mechanism provided by § [2]16(b)." 621 F.2d at 755.

plaintiffs herein filed a charge on time, as expressly required by ADEA, and further, despite the fact that the 18 plaintiffs cannot satisfy the limited piggyback exception recognized by some courts in ADEA opt-in actions. The EEOC's view that a plaintiff can "maintain an ADEA action so long as a timely charge has been filed," *id.* at 7, seemingly would permit piggyback plaintiffs to maintain ADEA actions five, ten, even fifteen or twenty years after "a" timely charge was filed, even if the charge was not filed in connection with these ADEA actions. Such a view does violence to the plain language of the statute and to the EEOC's function of conciliating charges. The Second Circuit's adoption of the EEOC's interpretation of single-filing rule should not stand.

C. The Second Circuit's Rule Improperly Departs From, And Indeed Conflicts With, The Rules Adopted In Other Circuits

Not only does the Second Circuit's decision read Section 626(d) out of the ADEA, but it departs from, and conflicts with all previous decisions in all other courts that have examined the concept of piggybacking.

For example, the Tenth Circuit in *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980), held specifically that "the ADEA authorizes grievants *who have complied with § 626(d)* to bring *representative actions* pursuant to § 216(b) on behalf of *'similarly situated'* employees. . ." *Id.* at 593 n.3. (emphasis added). Clearly, however, this case involves no plaintiffs who complied with § 626(d) by filing a charge.[10] Moreover, the *Lusardi* class was decertified expressly because none of the former opt-in claim-

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[10] *Mistretta* apparently would permit "similarly situated" plaintiffs to join an action so long as *one* plaintiff has "complied with the notice requirements of 29 U.S.C. § 626(d)." 639 F.2d at 593 n.3. Clearly, this is not such a case. More importantly, EEAC requests this Court to adopt the rule that *each* opt-in plaintiff must file a timely charge.

ants, including the plaintiffs herein, are similarly situated to the *Lusardi* plaintiffs.

And in *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979), the Ninth Circuit ruled that would-be plaintiffs who have not filed charges may "join in an action as unnamed parties *so long as a named plaintiff* has complied with the notice requirements of 29 U.S.C. § 626(d)." (Emphasis added). *See also Kloos*, 799 F.2d 397, 400 (8th Cir. 1986) ("we follow *Mistretta* and *Bean* and hold that it is sufficient for one or more plaintiffs to the action to have properly filed a charge"). Here, in direct conflict with the Tenth, Ninth and Eighth Circuits, the Second Circuit has permitted the plaintiffs to use the single filing rule even though none have filed the requisite Section 626(d) charges.

Indeed, all other circuits permitting a plaintiff to piggyback have done so only where there is some factual nexus between the plaintiffs attempting to piggyback and the person who has filed the timely charge. For example, in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), the Third Circuit noted that those attempting to piggyback worked in the same division with those who filed timely charges, and all had the same manager, were separated in conjunction with the same discriminatory scheme, and sought the same relief. A suit must be "limited to individuals similarly situated" to the filing party. *Price v. Maryland Casualty Co.*, 62 F.R.D. 614, 615 (S.D. Miss. 1972), *aff'd*, 561 F.2d 609 (5th Cir. 1977). *See also Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981).

As explained fully in Xerox's Petition for a Writ of Certiorari at pp. 40-52, the Second Circuit, in direct conflict with other courts, has effectively eliminated this nexus requirement, and improperly concentrates the breadth of the charge. Under its single filing rule, "the broader and more generic the language in the contents of the charge, the greater the number of persons who can piggyback on it." *Id.* at 42.

Accordingly, this Court should grant Xerox's petition for a writ of certiorari, not only to resolve the split in the circuits, but to put meaning back into the ADEA's charge filing provision.

II. COGENT POLICY REASONS SUPPORT THIS COURT'S ACCEPTANCE OF THIS CASE FOR REVIEW, AND COMPEL REJECTION OF THE SINGLE-FILING RULE FOR THESE UNTIMELY PLAINTIFFS

The Second Circuit's decision effectively obviates the ADEA's clear statutory language on the grounds that the "purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance." 918 F.2d at 1057. As we now show, however, strong policy reasons instead favor enforcement of ADEA's strict filing requirements, and compel rejection of the single filing rule.

A. Enforcement Of The ADEA's Strict Filing Requirements And Rejection Of The Single-Filing Rule Will Encourage Employers To Conciliate Disputes Informally, Thereby Avoiding Litigation

The ADEA's charge filing requirement is designed to provide "an opportunity to eliminate alleged unlawful practices through informal methods of conciliation." H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 12 (1978); *Kloos*, 799 F.2d at 400; *Foster*, 109 F.R.D. at 170. Then, when the EEOC presents the full extent of the allegations, the employer is given "a chance to rectify voluntarily the alleged violation, thereby avoiding a court action." *Foster*, 109 F.R.D. at 170. EEAC's member companies use conciliation to resolve disputes, and the ADEA's strict filing requirements properly facilitate that resolution. *See, Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 841 and n.11 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (conciliation is the ADEA's "most

favored method of enforcement"). In its decision below, however, the Second Circuit misconstrued the notion of conciliation, ruling that the ADEA's statutory purpose will be met with the single-filing rule. The implication, unexplainably, is that employers will be more likely to conciliate where, as here, a broadly worded charge has been filed.

If allowed to stand, the Second Circuit's ruling will actually destroy the viability of EEOC's conciliation process. An employer will never know whether a single claim could later mushroom into limitless other claims or whether the plaintiffs piggybacking on the charges will be similarly situated to the charging party. Therefore, an employer would not know with whom to conciliate. Indeed, an employer would have to wait indefinitely just to know the potential magnitude of its liability. Also, the EEOC would have no way of knowing what activities were encompassed by the conciliation. This Court should not sanction a rule that requires employers to "treat all individual charges as potential class actions," *Kloos*, 799 F.2d at 400, and thereby "labor under the threat of a covert class action throughout the judicial proceedings," *id.* at 400-01. The unintended result would be that employers would seldom use conciliation.

Accordingly, as a means of encouraging the full use of conciliation, this Court should accept the case for review with an eye towards rejecting the single-filing rule.

B. Rejection Of The Single-Filing Rule Is Necessary To Ensure Formal Notice To The Employer Of The Charges Against It, Permitting It To Preserve Records, Secure Witnesses, And Conduct An Appropriate Defense

The Second Circuit's decision below also erroneously implies that only the EEOC, not the employer, needs to be alerted to claims of discrimination. It states:

> When the *Lusardi* named plaintiffs filed their charges, the EEOC was on notice that Xerox stood accused of implementing its reduction in force during the years 1981 through 1983 by discriminating on the basis of age against those aged 40 to 70. The *Lusardi* plaintiffs did not purport to be complaining of isolated instances of age discrimination. Rather, they alerted the EEOC to a claim of age discrimination throughout the company's domestic operations.

918 F.2d at 1059. Conciliation is impossible if a single charge alleging nationwide discrimination relieves other plaintiffs of any obligation to file a timely charge that would apprise both the employer and the EEOC of the actual issues involved. Clearly, therefore, employers, as well as the EEOC, need to have formal notice of the charges against them in order to conduct an appropriate defense. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.[illegible] (1982).[11]

In conducting an appropriate defense, an employer needs to be apprised of the scope of a charge in order to preserve records and secure witnesses. As the Fifth Circuit noted in *Edwards v. Kaiser Aluminum and Chem-*

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[11] The defense of class claims "differ[s] from individual actions in a number of respects—most significantly in factual complexity and their potential for far-reaching monetary and equitable relief. . . ." *Anderson v. Montgomery Ward & Co., Inc.*, 40 F.P.D. 43,428, 43,430, *rev'd on other grounds and withdrawn*, 631 F. Supp. 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 1008 (7th Cir. 1988). It was this fundamental distinction between the two types of claims that led the district court in *Anderson* to reason that "it is not a matter of indifference to an employer whether an employee files suit in his own behalf alleging a pattern of discrimination, or a class action containing similar allegations." *Id.* Since "it is reasonable for employers to respond differently" to the two types of claims, "[a]llowing the conversion of individual actions into class actions long after the litigation has begun, as plaintiffs would have the Court do here, would require employers to treat all discrimination suits as class action, a result that would be both wasteful and unfair." *Id.*

ical Sales, 515 F.2d 1195, 1199 (5th Cir. 1975), timely filing promotes "informal good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources." Thus, the Second Circuit imposes an improper burden on Xerox of showing that conciliation "would have succeeded if Xerox had known the exact number of the names of those who would subsequently advance the same claim." 918 F.2d 1052, 1059. Rather, the Court should adopt a rule that allows successful conciliation as envisioned by the timely filing requirements of the ADEA. It is unfair to require Xerox or any employer to defend against claims of which they have not been fairly alerted.

C. Strict Time Requirements Are Necessary To Prevent Late Filings By Plaintiffs With "Subsequent Motivations Or Reassessments," A Concern Of Particular Importance Under The ADEA

Another compelling reason for this Court to accept this case to enforce the ADEA's strict filing requirement is to "limit[] the chances for the filing of suits based on subsequent motivations or reassessments." *Kloos*, 799 F.2d at 400.[12] This timely filing requirement "is of *particular* significance in the age discrimination area, where every employed person over the age of forty is a potential plaintiff." *Id.* (emphasis added). The *Foster* court stated:

> Such a limitation is of particular importance for age discrimination claims. Under this statute *everyone who lives out a substantial part of his life ex-*

[12] Amicus EEAC is not alleging improper motive on behalf of the former Xerox employees herein who, after failing to file timely charges, and failing to opt-in on time, are now getting, as stated by the district court below, a "free ride." A. 18. But such a scenario is entirely possible in the next case if this Court does not grant the petition and reverse the single filing rule.

> *pectancy is a potential plaintiff. Virtually everyone in the work force at some point fails to get something they might have wanted.* Whether the person was fired or merely failed to be chosen for a raise or promotion, he or she is a potential plaintiff if over 40. *By adopting the requirement of a prompt administrative charge, Congress unquestionably sought to limit the potential for the filing of suits based on tardy reassessments.*

109 F.R.D. at 170 (emphasis added). Accordingly, the prevention of late filings due to "subsequent reassessments," and the "particular importance" this limitation represents in ADEA claims, compels the adoption of a strict filing rule, and the rejection of the "single-filing rule."

CONCLUSION

For the foregoing reasons, EEAC respectfully urges this Court to grant Xerox's petition for a writ of certiorari.

Respectfully submitted,

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